AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 135.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, AND S. H. H. CLARK ET AL., RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

LIBBA MARTIN, ADMINISTRATRIX OF THE ESTATE OF WILLIAM MARTIN, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

RECORD FILED SEPTEMBER 12, 1898.

(16,986.)

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a In the Supreme Court of the State of Kansas.

Be it remembered that on the 15th day of July, 1895, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error, with a case-made of the proceedings of the district court attached thereto and made a part thereof; which is in words and figures as follows, to wit:

b In the Supreme Court of the State of Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error, *vs.* LISSA MARTIN, as Administratrix of the Estate of William Martin, Deceased, and The Chicago, Rock Island & Pacific Railway Company, Defendants in Error.	Filed Jul- 15, 1895. C. J. Brown, Clerk Sup. Court.

Petition in Error.

The above-named plaintiffs in error complain of the said defendants in error for that the said Lissa Martin, as administratrix of the estate of William Martin, deceased, upon the 17th day of July, 1894, in the district court of Clay county, Kansas, recovered a judgment by the consideration of said court against the said plaintiffs in error and the said Chicago, Rock Island & Pacific Railway Company in the sum of ten thousand dollars and costs in a certain action then pending in said court wherein said Lissa Martin, as administratrix of the estate of William Martin, deceased, was plaintiff and The Chicago, Rock Island & Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, were defendants. The original case-made in said cause is hereto attached, marked Exhibit A, and made a part of this petition in error.

And the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, plaintiffs in error, allege that there is error in the said case-made in this, to wit:

1st. Irregularity in the proceedings of the court, jury, plaintiff, and the defendant The Chicago, Rock Island & Pacific Railway Company, orders of the court, and abuse of discretion by which said receivers were prevented from having a fair trial.

2nd. Misconduct of the jury, plaintiff, and the defendant The Chicago, Rock Island & Pacific Railway Company.

3rd. Excessive damages appearing to have been given under the influence of passion and prejudice.

4th. Because the verdict against said receivers of the Union

Pacific Railway Company is not sustained by sufficient evidence and is contrary to the evidence.

5th. Because the verdict against said receivers of the Union Pacific Railway Company is contrary to law.

6th. Because the court erred in admitting certain testimony offered by the plaintiff and by the defendant The Chicago, Rock Island & Pacific Railway Company over the objections and exceptions of said receivers of the Union Pacific Railway Company.

7th. Because the court erred in refusing to admit certain testimony offered by said defendants, receivers of the Union Pacific Railway Company, to which rulings of the court in refusing to admit said testimony the said receivers duly objected and excepted at the time.

c–e 8th. Because the court erred in giving to the jury certain instructions of its own motion, to the giving of which instructions said receivers at the time duly excepted.

9th. Because the court erred in giving to the jury certain instructions requested by the plaintiff, to the giving of which instructions said receivers at the time duly excepted.

10th. Because the court erred in giving to the jury certain instructions requested by said Chicago, Rock Island & Pacific Railway Company, to the giving of which instructions said receivers duly excepted at the time.

11th. Because the court erred in refusing to give to the jury certain instructions requested by said receivers, to which rulings of the court in refusing to give said instructions said receivers duly excepted at the time.

12th. Because the court erred in submitting to the jury certain interrogatories propounded by said Chicago, Rock Island & Pacific Railway Company, to the submission of which interrogatories said receivers at the time duly excepted.

13th. Because the court erred in refusing to submit to the jury for answer certain interrogatories propounded by said receivers of the Union Pacific Railway Company, to which refusal of the court to submit said questions said receivers at the time duly excepted.

14th. Because of other errors of law not hereinbefore enumerated occurring at the time and excepted to by said receivers at the time.

15th. Because the court lost jurisdiction of said cause upon the filing by said receivers of their petition and bond for the removal of said case to the United States circuit court for the district of Kansas, and thereafter said court had no power to proceed with the trial of said cause.

16th. Because the court erred in refusing to sustain the application of said receivers for the removal of said cause to the United States circuit court for the district of Kansas.

17th. Because the court erred in refusing to sustain the motion of said receivers for a new trial.

Said plaintiffs in error allege that the amount in controversy herein, exclusive of interest and costs, exceeds the sum of two thousand dollars. Wherefore said S. H. H. Clark, Oliver W. Mink, E.

Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs in error, pray that said judgment may be reversed and the said plaintiffs in error restored to all things that they have lost by reason thereof.

A. L. WILLIAMS,
N. H. LOOMIS, &
R. W. BLAIR,
Attorneys for S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error.

Filed Jul- 15, 1895.

C. J. BROWN,
Clerk Sup. Court.

f In the Supreme Court of the State of Kansas.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILway Company, Plaintiff in Error, *v.* LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants in Error.	Petition in Error.

Said The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, alleges and shows to the court that on the 17th day of July, 1894, said Lissa Martin, administratrix of the estate of William Martin, deceased, defendant in error, obtained a judgment in the district court of Clay county, State of Kansas, by the consideration of said court, for the sum of ten thousand dollars and costs against said plaintiff in error, The Chicago, Rock Island and Pacific Railway Company, and said defendants in error, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, in a certain action then pending in said district court of Clay county, wherein said Lissa Martin, administratrix of the estate of William Martin, deceased, defendant in error, was plaintiff, and said The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, defendants in error, were defendants, and that the amount and value in controversy
g herein, exclusive of costs, exceeds the sum of one hundred dollars; an original case-made of which judgment and the pleadings and proceedings had in said cause in said district court is hereto attached and made a part of this petition in error.

Said The Chicago, Rock Island and Pacific Railway Company,

plaintiff in error, alleges that there is error in said judgment and proceedings in this, to wit:

1. That the court erred in admitting incompetent and improper evidence over the objections and exceptions of said plaintiff in error, as will more fully appear by reference to the following, among other, pages of said case-made: 136, 188, 189, 217, 238, 241, 261, 262, 319, 320, 352, 353, 354, 356, 357, 366, 367, 368, 373, 375, 376, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 408, 409, 413, 414, 415, 438, 439, 449, 450, 455, 462, 463, 464, 466, 467, 470, 478, 506, 507, 508, 509, 514, 515, 519, 528, 529, 531, 570, 571, 572, 573, 578, 580, 612, 613, 614, 632, 651, 671, 673, 674, 675, 680, 681, 687, 688, 689, 690, 691.

2. That the court erred in sustaining objections of the plaintiff below to competent and proper questions propounded by the defendant below, The Chicago, Rock Island and Pacific Railway Company, on the cross-examination of the witnesses of the plaintiff below.

3. That the court erred in sustaining objections of S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, defendants below, to competent and proper questions pro-
h pounded by the plaintiff in error on the cross-examination of the witnesses of the plaintiff below.

4. That the court erred in sustaining objections of the plaintiff below to competent and proper questions propounded by the plaintiff in error on the cross-examination of the witnesses of S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, defendants in error.

5. That the court erred in sustaining objections of S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, defendants below, to competent and proper questions propounded by the plaintiff in error on the cross examination of the witnesses of said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, defendants in error.

6. That the court erred in overruling objections of plaintiff in error to incompetent and improper questions propounded by the plaintiff below to her witnesses.

7. That the court erred in overruling objections of the plaintiff in error to incompetent and improper questions propounded by defendants in error S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as receivers of the Union Pacific Railway Company, to their witnesses.

8. That the court erred in overruling the motions of plaintiff in error to strike out incompetent and improper evidence offered by the plaintiff below and the defendants below, S. H. H. Clark,
i Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as will more fully appear by reference to the follow-

ing, among other, pages of said case-made: 437, 451, 473, 507, 537, 575, 816.

9. That the court erred in refusing to strike out and take from the jury incompetent and improper evidence on motion of plaintiff in error.

10. That the court erred in excluding competent and proper evidence offered by the plaintiff in error.

11. That the court erred in overruling the demurrer of the plaintiff in error offered at the close of the evidence-in-chief of the plaintiff below, as shown on page 364 of said case-made.

12. That the court erred in overruling the petition and application of the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, for the removal of said cause to the United States circuit court, and erred in refusing to remove said cause to said circuit court, as shown on page 16 of said case-made.

13. That the court erred in overruling the objection of plaintiff in error to the trial of said cause in said district court, as shown on page 26 of said case-made.

14. That the court errred in overruling the objection of plaintiff in error to the introduction of any evidence on the trial of said cause, as shown on page 48 of said case-made.

15. That the court erred in overruling the objection of plaintiff in error to the introduction of the photograph marked Exhibit C and contained in said case-made between pages 375 and 376 thereof, as shown on page 376 of said case-made.

16. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error the photograph marked Exhibit C, contained in said case-made between pages 375 and 376 thereof.

17. That the court erred in overruling the objection of plaintiff in error to the introduction of the photograph marked Exhibit E and contained in said case-made between pages 381 and 382 thereof, as shown on page 382 of said case-made.

18. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the photograph marked Exhibit E, contained in said case-made between pages 381 and 382 thereof.

19. That the court erred in overruling the objection of plaintiff in error to the introduction of the photograph marked Exhibit D and contained in said case-made between pages 384 and 385 thereof, as shown on page 385 of said case-made.

20. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the photograph marked Exhibit D, contained in said case made between pages 384 and 385 thereof.

21. That the court erred in overruling the objection of plaintiff in error to the introduction of the photograph marked Exhibit F and contained in said case-made between pages 389 and 390 thereof, as shown on page 390 of said case-made.

22. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the photograph marked Exhibit F, contained in said case-made between pages 389 and 390 thereof.

23. That the court erred in overruling the objection of plaintiff in error to the affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 687 of said case-made.

24. That the court erred in admitting in evidence, over the objection and exception of the plaintiff in error, the affidavit of R. W. Blair, as shown on pages 687, 688, 689, 690, and 691 of said case-made, and offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company.

25. That the court erred in overruling the objection of plaintiff in error to the following portion of said affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 687 and 688 of said case-made:

"That he knows what the condition of the track and surroundings were at the time and place in question in this case, and knows what changes, if any, have been made in said track and surroundings at the present time; that he was present at the scene of the wreck in question in this case on the same morning it occurred and within a few hours thereafter, and knows the exact point where the collision took place; that he pointed out to the photographer who took the pictures to be used in evidence in this case the point of the said collision, and placed cars and engines in proper position for the purpose of having said photographs taken; that he pointed out to Charles Downing and P. Conrad the point of said collision."

26. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, that portion of the affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as set out in assignment of error No. 25 of this petition in error and as shown on pages 387 and 388 of said case-made.

27. That the court erred in overruling the objection of plaintiff in error to the following portion of said affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 688 of said case-made:

"That no changes whatever have been made in the line of the track in question between Lawrence and Linwood since the 1st day of January, 1894, and that no substantial changes have been made

in the grade of said track between said points since said 1st day of January, 1894; that the only change has been the placing of a few cinders upon the road-bed in the vicinity of the wreck in question, but that the change in the grade effected thereby has been almost imperceptible." * * * "That the tail lights upon the Union Pacific train which was run into could have been seen by an engineer or fireman upon the following Rock Island train for a distance of a mile and a half west of the point of collision, and that there were no obstructions whatever in the way which would have
m prevented the men upon the engine of the Rock Island train from having a plain view of the tail lights of the Union Pacific train No. 1st twelve at any point from the place of collision westward for the distance of a mile and a half."

28. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, that portion of the affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as set out in assignment of error No. 27 of this petition in error and as shown on page 688 of said case-made.

29. That the court erred in overruling the objection of plaintiff in error to the following portion of said affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on pages 688 and 689 of said case-made:

"That upon a clear night a careful and competent engineer can form a reasonably correct judgment of the distance ahead a forward train is by its tail lights, and that when the view of the tail lights is not obscured by heavy fogs or obstructed by curves a careful and competent engineer can always form a sufficiently accurate idea of the distance ahead of the forward train to enable him to prevent his train from running into the forward train." * * * "That the engineer in charge of the Rock Island train, if he had been on the lookout, could have seen the tail lights of the Union Pacific train ahead of him in ample time to have determined the distance
n away it was from its tail lights alone, and in ample time to have stopped his train before running into the Union Pacific train."

30. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, that portion of the affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as set out in assignment of error No. 29 of this petition in error and as shown on pages 688 and 689 of said case-made.

31. That the court erred in overruling the objection of plaintiff in error to the following portion of said affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R.

Coudert, as receivers of the Union Pacific Railway Company, as shown on page 689 of said case-made:

"That in view of the distance ahead the tail lights of the Union Pacific train could have been seen by the engineer of the Rock Island train, it was not necessary, under the rules and regulations of the receivers of the Union Pacific Railway Company, for the men in charge of Union Pacific train 1st twelve to have thrown off a fusee at the time and place in question and just prior to the time of the collision in question; that under the rules and regulations of the Union Pacific Railway Company receivers, in force at that time, it was the duty of the rear brakeman of the Union Pacific train to be prepared, when the Union Pacific train slowed up near Linwood, to get off the train and go back to flag the Rock Island train when

o the Union Pacific train should come to a stop; that this was all that was required of the employees of the Union Pacific train at the time and place in question; that the employees in charge of the Union Pacific train had a right to believe, so long as their tail lights were visible to the following train for over half a mile, that the men in charge of the Rock Island train would keep a lookout for trains ahead and by watching the tail lights of the Union Pacific train be able to gauge the movements of the Rock Island train and prevent a collision with the forward train."

32. That the court erred in admitting in evidence, over the objection and exception of the plaintiff in error, that portion of the affidavit of R.W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as set out in assignment of error No. 31 of this petition in error and as shown on page 689 of said case-made.

33. That the court erred in overruling the objection of plaintiff in error to the following portion of said affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on pages 689 and 690 of said case-made:

"That, under said rules and regulations of the Union Pacific railway, a fusee is not such a signal as requires an answer from the engineer of the train coming towards it; that the only signals displayed upon the track ahead of an approaching train which must be answered by engineers are those held in the hands of some person, and the object of giving an answer to such signal is to indicate to the person holding the signal that it has been seen and understood."

p 34. That the court erred in admitting in evidence, over the objection and exception of the plaintiff in error, that portion of the affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as set out in assignment of error No. 33 of this petition in error and as shown on pages 689 and 690 of said case-made.

35. That the court erred in overruling the objection of plaintiff in error to the following portion of said affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 690 of said case-made:

"That when the engineer of the Union Pacific 1st twelve came upon the fusee thrown from the train preceding it, just prior to the collision in question, and had a plain view of the train ahead of him, standing at Linwood station, it was not necessary for him, under such circumstances, to wait for the fusee to burn out, and he had a right to close up to the head train with the Union Pacific train under control; that the only object of a fusee is in times of heavy fogs and places of sharp curves, when a preceding train could only be seen a short distance ahead, and not in time to stop the following train, to indicate to the following train that another train left the point where the fusee was thrown less than ten minutes ahead; that when the head train can be seen by the following train to be standing at the station, the following train has the right to close in upon it, notwithstanding a fusee may be burning upon the track."

7 36. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, that portion of the affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as set out in assignment of error No. 35 of this petition in error and as shown on page 690 of said case-made.

37. That the court erred in overruling the objection of plaintiff in error to the following portion of said affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 690 of said case-made:

"That the train which ran into the Union Pacific train at the time and place in question was a Chicago, Rock Island & Pacific train in charge of men employed by that company, and that said train at the time and place in question was exclusively under the control of the Chicago, Rock Island & Pacific Railway Company and not under the control of the receivers of the Union Pacific Railway Company; * * * that all tickets used on said Union Pacific train number first twelve were burned in the wreck at the time of the accident in question."

38. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, that portion of the affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as set out in assignment of error No. 37 of this 7 petition in error and as shown on page 690 of said case-made.

39. That the court erred in overruling the objection of plaintiff in error to the following portion of said affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as receivers of the Union Pacific Railway Company, as shown on pages 690 and 691 of said case-made:

"That fusees have only been in general use for the past seven years; that prior to that time nearly all the railroads in the country were successfully and safely operated without the use of such devices, and that at the present time there are many of the largest railroads in the United States being successfully and safely operated without the use of fusees; that fusees are not essential to the safe operation of railroads; that the companies that use them nearly all follow different rules with reference to their use, some using them more frequently than others, and, as already stated, some roads not using them or other similar devices at all."

40. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, that portion of the affidavit of R. W. Blair, offered in evidence by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as receivers of the Union Pacific Railway Company, as set out in assignment of error No. 39 of this petition in error and as shown on pages 690 and 691 of said case-made.

41. That the court erred in overruling the motion of plaintiff in error, as shown on page 692 of said case made, to exclude from the jury all of the evidence offered by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as receivers of the Union Pacific Railway Company.

42. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the plaintiff below, as shown on page 319 of said case made:

"You may turn to your tables and state what is the expectancy of a man in good health, who had not been sick, we will say, for seven years, at the age of 34 years. State from those tables what his expectancy of life was."

43. That the court erred in admitting in evidence, over the objection and exception of the plaintiff in error, the answer to the interrogatory set out in the 42d assignment of error herein, as shown on page 319 of said case-made, as follows:

"Thirty-two years and five months would be the expectancy."

44. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the table marked Exhibit C B, as shown on page 320 of said case-made.

45. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the plaintiff below, as shown on page 334 of said case-made:

"Do you know about how much he spent upon his family in a year?"

46. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the inter-

rogatory set out in the 45th assignment of error herein, as shown on page 334 of said case-made, as follows:

"I recollect at one time of his counting it up, and I was
t helping him. We were talking the matter over, and it was something over $1,200."

47. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 353 of said case-made:

"Now, just state where you last saw the tail lights at the L. & L. junction and where you next saw them."

48. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 47th assignment of error herein, as shown on page 353 of said case-made, as follows:

"We saw the tail lights two miles and a half from the L. & L. junction."

49. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 353 of said case-made:

"Go on and tell when you next saw them."

50. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 49th assignment of error herein, as shown on page 353 of said case-made, as follows:

"We next saw them going up the straight line of track a mile and a little over from Linwood."

51. That the court erred in overruling the objection of
u plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 353 of said case-made:

"Where were you at that time?"

52. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 51st assignment of error herein, as shown on page 354 of said case-made, as follows:

"Coming down Fall Leaf hill."

53. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 354 of said case-made:

"About how far west of the point of collision was you when you saw the tail lights ahead of you?"

54. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrog-

atory set out in the 53d assignment of error herein, as shown on page 354 of said case-made, as follows:

"About two miles."

55. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 354 of said case-made:

"After you passed that timber what, if anything, was there
v to obstruct your view of the tail lights?"

56. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 55th assignment of error herein, as shown on page 354 of said case-made, as follows:

"After we passed the timber and went around the curve there was nothing to obstruct the view."

57. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 354 of said case-made:

"At that time how far ahead of you were the tail lights of the preceeding train?"

58. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 57th assignment of error herein, as shown on page 355 of said case-made, as follows:

"The tail lights were about a mile ahead of us."

59. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 355 of said case-made:

"Did you see those tail lights as they rounded the curve at the point of collision?"

60. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the
w interrogatory set out in the 59th assignment of error herein, as shown on page 355 of said case-made, as follows:

"Yes, sir."

61. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 355 of said case-made:

"After the train had all passed around the curve near the point of collision, did these tail lights disappear from view?"

62. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 61st assignment of error herein, as shown on page 355 of said case-made, as follows:

"No, sir; they did not."

63. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 355 of said case-made:

"Was there anything there about that curve to obstruct your view from the tail lights of the train ahead of you?"

64. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 63d assignment of error herein, as shown on page 356 of said case-made, as follows:

"There was not."

65. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 356 of said case-made: x

"The timber referred to is immediately east of the line referred to upon the right-hand side of the track going east—between the track and the river. Now, at the time you were up at the timber about where were the tail lights ahead of you?"

66. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 65th assignment of error herein, as shown on page 356 of said case-made, as follows:

"When we rounded the timber they were about a mile ahead of us."

67. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 357 of said case-made:

"Did you see it when it went around the curve?"

68. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 67th assignment of error herein, as shown on page 357 of said case-made, as follows:

"Yes, sir."

69. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 357 of said case-made: y

"Now, while you were following those tail lights along that straight track did you have any difficulty in distinguishing them?"

70. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interroga-

tory set out in the 69th assignment of error herein, as shown on page 357 of said case-made, as follows:

"We could approximate the distance."

71. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 367 of said case-made:

"Now, prior to the collision, state whether or not there was any slackening of the speed of the Rock Island train."

72. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 71st assignment of error herein, as shown on page 368 of said case-made, as follows:

"No, sir; there was not."

73. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 415 of said case-made:

"Mr. Downing, please state, as a matter of fact, how far you can see tail lights upon the rear of a caboose standing at the point of collision while sitting on the engineer's seat on a locomotive approaching the tail lights from the west."

74. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 73d assignment of error herein, as shown on page 415 of said case-made, as follows:

"Over a mile, sir."

75. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 415 of said case-made:

"Now, suppose the caboose to be at the point of collision here, with three tail lights on the end of it, please indicate upon the map how far west of there you could see these tail lights while sitting on the engineer's seat in the cab and while approaching those tail lights."

76. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 75th assignment of error herein, as shown on page 415 of said case-made, as follows:

"From here, sir, witness indicating a point on the track opposite mile post thirty."

77. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 438 of said case-made:

aa

"Now, what was the appearance of the train as it approached you at that time as to the way it was running?"

78. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 77th assignment of error herein, as shown on page 438 of said case-made, as follows:

"It appeared to me to be approaching quite fast."

79. That the court erred in refusing to strike out and take from the jury, on motion of plaintiff in error, the following answer on page 438 of said case-made:

"None."

80. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 449 of said case-made:

"You may state what that conversation was."

81. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 80th assignment of error herein, as shown on page 449 of said case-made, as follows:

"There was some talk there. He was charged with running 40 miles per hour. Somebody was saying that our train or his train was running 40 miles per hour and he said he wasn't running at that rate of speed, he didn't think."

82. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 449 of said case-made:

ab

"Now, go on and state what else, if anything, was said."

83. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 82d assignment of error herein, as shown on page 449 of said case-made, as follows:

"He said they examined the time-sheet in the indicator on the way car and it indicated 28 miles an hour."

84. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 449 of said case-made:

"At what point?"

85. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 84th assignment of error herein, as shown on page 449 of said case-made, as follows:

"At the time this wreck occurred."

86. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below,

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 449 of said case-made:

ac "Did he say anything further about it?"

87. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 86th assignment of error herein, as shown on page 449 of said case made, as follows:

"Nothing further, except that I made the remark to him——"

88. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 456 of said case-made:

"State whether or not at the time these torpedoes were pointed out you knew that your train was going to stop."

89. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 88th assignment of error herein, as shown on page 456 of said case-made, as follows:

"Not positive."

90. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 457 of said case-made:

"Now, as an engineer, is approaching these tail lights from that point, state whether or not there are any intervening places to interfere with seeing these tail lights."

91. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the

ad interrogatory set out in the 90th assignment of error herein, as shown on page 457 of said case-made, as follows:

"No, sir."

92. That the court erred in overruling the motion of plaintiff in error to strike out the following answer of the witness D. C. Bevard, introduced by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 463 of said case-made:

"I could distinguish them."

93. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 463 of said case-made:

"State whether or not an engineer approaching tail lights, in the manner suggested by my former question, could he be able to distinguish the distance those tail lights were ahead with sufficient accuracy to prevent his train from running into the forward train?"

94. That the court erred in admitting in evidence, over the ob-

jection and exception of plaintiff in error, the answer to the interrogatory set out in the 93d assignment of error herein, as shown on page 464 of said case made, as follows:

"He could."

95. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, *ae* John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 464 of said case-made:

"What is the duty of the engineer running upon the track between Topeka and Kansas City with reference to keeping a lookout?"

96. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 95th assignment of error herein, as shown on page 464 of said case-made, as follows:

"Keep a sharp lookout ahead."

97. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 464 of said case-made:

"At all times?"

98. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 97th assignment of error herein, as shown on page 464 of said case-made, as follows:

"Yes, sir."

99. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 464 of said case-made:

"State whether or not it is the duty of the engineer, when he catches sight of tail lights ahead of him, to keep a lookout, *af* to keep watching those tail lights for the purpose of preventing his train from running into them, regardless of any other signals which may be displayed by the forward train."

100. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 99th assignment of error herein, as shown on page 465 of said case made, as follows:

"It is."

101. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 465 of said case-made:

"State whether or not any engineer, seeing tail lights ahead of him upon the track over a half mile away, with his train consisting

of sixteen loads and well equipped with air, would be able to stop his train before running into those tail lights ahead of him, and suppose his train were running at the rate of 25 to 28 miles an hour and upon a $\frac{4}{10}$ grade."

102. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 101st assignment of error herein, as shown on page 465 of said case-made, as follows:

"Yes, sir."

103. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson,
ag John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 466 of said case-made:

"Now you may state under what circumstances a fusee should be used."

104. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 103d assignment of error herein, as shown on page 466 of said case-made, as follows:

"In case of snow, storm, fog, or a man loosing time passing around a curve, knowing a train was following him out between stations, is the only time I would consider it necessary to use them."

105. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 466 of this case-made:

"Suppose, Mr. Bevard, a train is approaching a station where it is obliged to stop and is within the yard limits of that station, and suppose further that there is an unobstructed view of the tail lights of this train for over a mile and a half in the direction from which it has come, state whether or not under those circumstances it would be necessary to throw a fusee to protect a train."

106. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 105th assignment of error herein, as shown on page 467 of this case-made, as follows:

"It would not."

ah 107. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 467 of said case-made:

"Suppose an eastbound freight train were approaching Linwood in the night-time and should commence to slow up in the vicinity of the curve about where this accident happened, state whether or not it would be necessary to throw out a fusee for the purpose of protecting the rear end of their train."

108. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 107th assignment of error herein, as shown on page 467 of said case-made, as follows:

"It would not."

109. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 469 of said case-made:

"I wish you would state, Mr. Bevard, when trains are running in company with each other in contemplation of that rule."

110. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 109th assignment of error herein, as shown on page 469 of said case-made, as follows:

"Trains running in the same direction as close as they can be kept by the rule."

ai 111. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 469 of said case-made:

"State whether or not that rule is confined in its application to different sections of the same train."

112. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 111th assignment of error herein, as shown on page 470 of said case made, as follows:

"No, sir."

113. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 470 of said case-made:

"State whether or not it refers to all trains, regardless of their number, which are traveling in the same direction and as close together as permitted by the rule."

114. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 113th assignment of error herein, as shown on page 470 of said case-made, as follows:

"All trains of the same class, following in the same direction."

aj 115. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on pages 470 and 471 of said case-made:

"Now, that rule 105 provides for the observance of rules 88 or

89 under certain circumstances. Will you please state to the jury when, under rule 105, rule 88 should be observed and when rule 89 should be observed?"

116. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 115th assignment of error herein, as shown on page 471 of said case-made, as follows:

"88 should be observed when trains are running between stations or between telegraph stations by keeping ten minutes apart, as near as practicable for them to do. 89 applies to approaching stations."

117. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 471 of said case-made:

"Now, when two trains are traveling in the same direction and ten minutes apart, state whether or not at points where the forward train is obliged to stop for water or for any other reason the following train has a right to close in upon the forward train at such stations."

ak 118. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 117th assignment of error herein, as shown on page 471 of said case-made, as follows:

"It has a right to pull into the station, train under control."

119. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 506 of said case-made:

"Now, Mr. Bevard, you were asked with reference to fusees and in reference to engineers running over fusees. I will ask you to state to the jury when, if at all, an engineer could be censured for running over a burning fusee."

120. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 119th assignment of error herein, as shown on page 506 of said case-made, as follows:

"For instance, if an engineer is going up a grade and there is a fusee ahead of him, following another train close, he might pass over it with safety, or, in the case where this collision occurred, where this number twelve followed this number thirty down into the station."

121. That the court erred in overruling the motion of plaintiff in error to strike out the following answer of the witness D. C. Bevard, as shown on page 506 of said case-made, as follows:

al "For instance, if an engineer is going up a grade and there is a fusee ahead of him, following another train close, he might pass over it with safety, or in the case where this collision occurred,

where this number twelve followed this number thirty down into the station."

122. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 508 of said case-made:

"Now, Mr. Bevard, suppose that two trains traveling in company with each other and the forward train stops at a station for orders or water or any other purpose, and the track behind it is clear for a mile and a half or so, so that the tail lights on the forward train can be seen by the following train, and the forward train has thrown a fusee out a half a mile or so behind where it has stopped, state whether or not the engineer on the following train, under those circumstances, would be blamed for running over the fusee thrown by the forward train."

123. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 122d assignment of error herein, as shown on page 508 of said case-made, as follows:

"I would not censure him."

124. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 508 of said case-made:

am

"Why would he be justified under those circumstances?"

125. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 124th assignment of error herein, as shown on page 509 of said case-made, as follows:

"Everything is in his plain view; he would have a right to pull down."

126. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 512 of said case-made:

"Is an engineer, under any circumstances, justified in running his train by a station where the order board is in such a way that he can stop before reaching that order board?"

127. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 126th assignment of error herein, as shown on page 513 of said case-made, as follows:

"No, sir."

128. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John

W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 514 of said case-made:

"Now state whether or not two trains traveling under rule 105, being subject to that rule, and were obliged to travel under
an rules 88 and 89, whether that rule 89, under those circumstances, would apply to them, whether they were different sections of the same train or absolutely different trains."

129. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 128th assignment of error herein, as shown on page 515 of said case-made, as follows:

"It was."

130. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 515 of said case-made:

"Now, then, under those circumstances, suppose the forward train were obliged to stop at a station for any purpose to get orders or to get water, would the following train be permitted to close in on the forward train under that rule 89?"

131. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 130th assignment of error hereof, as shown on page 515 of said case-made, as follows:

"Yes, sir."

132. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 515 of said case-made:

"And when closing in upon the forward train would the
ao following train be subject to rule 89?"

133. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 132d assignment of error herein, as shown on page 516 of said case-made, as follows:

"Yes, sir."

134. That the court erred in overruling the motion of plaintiff in error to strike out the following answer of the witness James Follens, as shown on page 537 of said case-made:

"I think he had in that one instance."

135. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 573 of said case-made:

"Do you think that under the circumstances I have detailed in the last preceding question that the following train should be able to govern its speed and avoid a collision, even though no other signal was given it, except that conveyed to it by the tail lights?"

136. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 135th assignment of error herein, as shown on page 573 of said case-made, as follows:

"Yes, sir."

137. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson,
ap John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 573 of said case-made:

"Approaching a station of that kind, and over a track such as is just west of Linwood station there and at the point of this collision, would you consider it necessary for any additional signal to be given to the following train?"

138. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 137th assignment of error herein, as shown on page 574 of said case-made, as follows:

"No, sir; I would not."

139. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 574 of said case-made:

"When an engineer is approaching a station such a- Linwood and over a track like there is there, would you consider he was doing his duty if he devoted all of his time and attention to his injector and other machinery about the locomotive and didn't look out for obstructions and trains ahead of him after passing the road crossing just west of the point of collision?"

140. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 139th assignment of error herein, as shown on page 574 of said case-made, as follows:

"No, sir; I would not. He would not be attending to his duty."

aq 141. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 574 of said case-made:

"Now, if it became necessary, Mr. Donely, for an engineer as he approached this curve just west of the point of collision to take his eye off the track in front of him, what would he do to have a proper lookout kept so as to see any obstruction on the track ahead of him?"

142. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the inter-

rogatory set out in the 141st assignment of error herein, as shown on page 575 of said case-made, as follows:

"What could he do if his attention was devoted to something else?"

143. That the court erred in overruling the motion of plaintiff in error to strike out the following answer of the witness W. E. Donnelley, as shown on page 575 of said case-made:

"He could have asked the fireman to keep a watchout for the train he was following for any obstruction on the road; or, as a general thing on trains—engines and trains—the head man is riding ahead generally, and he could have asked him. He could either have asked the head brakeman or his fireman."

144. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, *ar* John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 632 of said case-made:

"Now, judging from your experience as an engineer and the observation you made at Linwood at the time you were down there, would you consider that a dangerous place, and one where it is necessary to flag?"

145. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 144th assignment of error herein, as shown on page 632 of said case-made, as follows:

"Not when I see a mile or a mile and a half of straight track; I wouldn't think it was a dangerous place."

146. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 632 of said case-made:

"If a train was rounding that curve there at the rate of ten or twelve miles an hour and there was a train anywhere on the straight track behind it, would you think it was necessary for the train to drop off a flag at or near that curve in order to warn the following train?"

147. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 146th assignment of error herein, as shown on page 633 of said case-made, as follows:

"No; I would not think it was when you could see there a *as* mile and a half or two miles. Well, you could see around the curve there for a mile, I should think."

148. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 633 of said case-made:

"I understand you to say the engineer of the following train

would be able to see the tail lights in time to avoid a collision then, though no other signal was given."

149. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 148th assignment of error herein, as shown on page 634 of said case-made, as follows:

"I would think so; yes, sir."

150. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 634 of said case-made:

"Now, would it make any difference, Mr. Slade, if two trains were at Lawrence together and the forward train had become stalled there near the depot and the rear train had pushed it over the hill, and then had started out behind the forward train ten minutes and followed it on down to Linwood, and knew it was somewhere within ten minutes ahead of it, would that be any more reason why it would not be necessary for the front train to drop off a flag or other signal as it came around this curve toward Linwood?"

at 151. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 150th assignment of error herein, as shown on page 634 of said case-made, as follows:

"It would not with me."

152. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 634 of said case-made:

"If you knew the train was ahead of you, and you had been following it clear down from Lawrence, and could see the train on ahead of you all the way down, do you think it would be necessary to warn you by a signal of any kind?"

153. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 152d assignment of error herein, as shown on page 634 of said case-made, as follows:

"No, sir."

154. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 634 of said case-made:

"And you think that the engineer would be able to control his rain and avoid a collision down here at this point, even though no other flag was thrown off?"

au 155. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 154th assignment of error herein, as shown on page 635 of said case-made, as follows:

"I would think if a man could see a train a mile and a half, he ought to be able to stop without any flag at all?"

156. That the court erred in overruling the objection of plaintiff in error to the following question propounded by the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as shown on page 635 of said case-made:

"I understand you to say an engineer ought to be able to determine the distance tail lights are away from him in time to avoid a collision, even though no other signals are given him from the rear of the train?"

157. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the answer to the interrogatory set out in the 156th assignment of error herein, as shown on page 635 of said case-made, as follows:

"Well, I don't know that he could in the night. If a man is on a road where he is well acquainted with the track he can locate a train very closely, but if he is not acquainted he cannot locate it so closely."

158. That the court erred in sustaining the objection to the following question propounded by the plaintiff in error to the witness W. I. Allen, and in refusing to permit said witness to answer said question, as shown on pages 916 and 917 of said case-made:

"Now, will you please tell the jury from that speed-sheet the rate of speed that that train was running at the past point indicated on the sheet prior to the collision?"

159. That the court erred in sustaining the objection to the following question propounded by the plaintiff in error to the witness W. I. Allen, and in refusing to permit said witness to answer said question, as shown on page 917 of said case made:

"Will you please take that speed-sheet, Mr. Allen, and tell the court and jury how fast number second thirty run between Lawrence and the place of collision, as shown by the speed-sheet?"

160. That the court erred in sustaining the objection to the following question propounded by the plaintiff in error to the witness W. I. Allen, and in refusing to permit said witness to answer said question, as shown on page 917 of said case-made:

"Now, take that speed-sheet and tell the speed that that train ran from the place of collision to that straight track."

161. That the court erred in excluding proper and competent evidence offered by the defendant below, The Chicago, Rock Island and Pacific Railway Company, as shown by the following, among other, pages of said case-made:

287, 288, 693, 816, 855, 856.

162. That the court erred in admitting in evidence, over the objection and exception of plaintiff in error, the following testimony of the witness Mr. Loomis, as shown on pages 898 and 899 of said case-made:

"I was informed and believed that this Mr. McKee was sent to Kansas for the purpose of putting in about three months among our

employees, who would be witnesses in this case, for the pur-
aw pose, so far as possible, of corrupting them and getting them to testify falsely in this case. I heard Mr. McKee was directing his attention to Mr. Nickle, and I heard of Mr. McKee being with Mr. Nickle in a bar-room, of his offering Mr. Nickle a run out of Ft. Worth if he would do it and if he would testify for the Rock Island Company. I heard of Mr. McKee being with Mr. Nickle all night, and that he didn't report to his train as he ought to have done. I heard Mr. Nickle was going to testify so and so, contrary to what he testified before the coroner. I sent for Mr. Nickle; I talked it over with him carefully; I cross examined him, and he didn't vary from his testimony before the coroner's jury. I thought I was mistaken. I came to Clay Center at the trial of the Dittmar case, but it would keep coming to me all the time that Nickle was going to testify contrary to what he had testified to before the coroner; that he had been tampered with; that this man McKee had persuaded him to tell falsehoods about this case, and I talked with him again. He told me the same story he had originally told me, and I thought I was mistaken again; but it kept coming to me again, and the day before he went on the stand I got him into my room and asked him about it again, and I told him all the circumstances I had heard, and he then told me what he was going to testify to the next day, but it was different from what he testified to before the coroner's jury, and I believed sincerely, and still believe, he was tampered with by the Rock Island Company, and was induced to testify falsely on the trial of the Dittmar case, and did testify contrary to what he testified to before the coroner's inquest. I believe the Rock Island Company has tampered with not only more witnesses"——

ax 163. That the court erred in using the following language on the trial of said cause in the presence of the jury, as shown on page 901 of said case-made:

"Gentlemen, on the part of the Rock Island, it doesn't seem to me it comes with very good grace for you to sit here and make objections to Mr. Loomis's explanations. You have drawn this matter out, and, for the purpose of trying to influence the jury in some way, you have got out what you thought you wanted and there you want the thing to stop, and it doesn't seem to me that it comes with good grace to make so many objections."

164. That the court erred in admitting the following evidence of the witness Mr. Loomis, over the objection and exception of plaintiff in error, as shown on page 904 of said case made:

"I believed a man was sent down in the middle of the night, as I believed, for the purpose of tampering with Mr. Nickle."

165. That the court erred in refusing to give to the jury instruction No. 1, asked by plaintiff in error, set out on page 927 of said case-made.

166. That the court erred in refusing to give to the jury instruction No. 2, asked by plaintiff in error, set out on page 927 of said case-made.

167. That the court erred in refusing to give to the jury instruc-

tion No. 3, asked by plaintiff in error, set out on page 927 of said case-made.

168. That the court erred in refusing to give to the jury instruction No. 4, asked by plaintiff in error, set out on page 928 of said case-made.

ay 169. That the court erred in refusing to give to the jury instruction No. 5, asked by plaintiff in error, set out on pages 928 and 929 of said case-made.

170. That the court erred in refusing to give to the jury instruction No. 6, asked by plaintiff in error, set out on page 929 of said case-made.

171. That the court erred in refusing to give to the jury instruction No. 7, asked by plaintiff in error, set out on pages 929 and 930 of said case-made.

172. That the court erred in refusing to give to the jury instruction No. 8, asked by plaintiff in error, set out on page 930 of said case-made.

173. That the court erred in refusing to give to the jury instruction No. 9, asked by the plaintiff in error, set out on pages 930 and 931 of said case-made.

174. That the court erred in refusing to give to the jury instruction No. 10, asked by plaintiff in error, set out on page 931 of said case-made.

175. That the court erred in refusing to give to the jury instruction No. 11, asked by plaintiff in error, set out on pages 931 and 932 of said case-made.

176. That the court erred in refusing to give to the jury instruction No. 12, asked by plaintiff in error, set out on page 932 of said case-made.

177. That the court erred in refusing to give to the jury instruction No. 13, asked by plaintiff in error, set out on pages 932 and 933 of said case-made.

az 178. That the court erred in giving to the jury instruction number first of the instructions that were given to the jury on the court's own motion, as set out on pages 958 and 959 of said case-made.

179. That the court erred in giving to the jury instruction number second of the instructions that were given to the jury on the court's own motion, as set out on page 959 of said case-made.

180. That the court erred in giving to the jury instruction number third of the instructions that were given to the jury on the court's own motion, as set out on page 959 of said case-made.

181. That the court erred in giving to the jury instruction number fourth of the instructions that were given to the jury on the court's own motion, as set out on page 959 of said case-made.

182. That the court erred in giving to the jury instruction number fifth of the instructions that were given to the jury on the court's own motion, as set out on page 959½ of said case-made.

183. That the court erred in giving to the jury instruction number sixth of the instructions that were given to the jury on the court's own motion, as set out on page 959½ of said case-made.

184. That the court erred in giving to the jury instruction number seventh of the instructions that were given to the jury on the court's own motion, as set out on page 960 of said case-made.

185. That the court erred in giving to the jury instruction number eighth of the instructions that were given to the jury on the court's own motion, as set out on page 960 of said case-made.

ba 186. That the court erred in giving to the jury instruction number ninth of the instructions that were given to the jury on the court's own motion, as shown on page 961 of said case-made.

187. That the court erred in giving to the jury instruction number tenth of the instructions that were given to the jury on the court's own motion, as set out on page 962 of said case-made.

188. That the court erred in giving to the jury instruction number eleventh of the instructions that were given to the jury on the court's own motion, as shown on page 962 of said case-made.

189. That the court erred in giving to the jury instruction number twelfth of the instructions that were given to the jury on the court's own motion, as shown on page 963 of said case-made.

190. That the court erred in giving to the jury instruction number 12½ of the instructions that were given to the jury on the court's own motion, as shown on page 964 of said case-made.

191. That the court erred in giving to the jury instruction number thirteenth of the instructions that were given to the jury on the court's own motion, as shown on page 965 of said case-made.

192. That the court erred in giving to the jury instruction number fourteenth of the instructions that were given to the jury on the court's own motion, as shown on pages 965 and 966 of said case-made.

193. That the court erred in giving to the jury instruction number fifteenth of the instructions that were given to the jury on the court's own motion, as shown on page 966 of said case-made.

194. That the court erred in giving to the jury instruction number sixteenth of the instructions that were given to the jury on

bb the court's own motion, as shown on page 967 of said case-made.

195. That the court erred in giving to the jury instruction number seventeenth of the instructions that were given to the jury on the court's own motion, as shown on page 968 of said case-made.

196. That the court erred in giving to the jury instruction number eighteenth of the instructions that were given to the jury on the court's own motion, as set out on page 968 of said case-made.

197. That the court erred in giving to the jury instruction number nineteenth of the instructions that were given to the jury on the court's own motion, as set out on page 969 of said case-made.

198. That the court erred in giving to the jury instruction number twenty of the instructions that were given to the jury on the court's own motion, as set out on page 970 of said case-made.

199. That the court erred in giving to the jury instruction number twenty-one of the instructions that were given to the jury on the court's own motion, as set out on page 971 of said case-made.

200. That the court misdirected the jury in matters of law.

201. That the court erred in overruling the motion of plaintiff in error for judgment in its favor on the special findings of the jury set out on pages 995 and 996 of said case-made, and as shown on page 996 thereof.

202. That the court erred in overruling the motion of plaintiff in error for a new trial, set out on pages 998, 999, and 1000 of *be* said case-made, and as shown on page 1001 thereof.

203. That the court erred in rendering judgment against the plaintiff in error, as shown on pages 1005, 1006, 1007, and 1008 of said case-made.

204. That the court erred in not rendering judgment in favor of the plaintiff in error against the plaintiff below on the special findings of the jury.

205. That the court erred in refusing to grant the defendant below, The Chicago, Rock Island and Pacific Railway Company, a new trial.

206. That the court erred in refusing to allow the plaintiff in error to file the amended answer set out on pages 920, 921, 922, 923, and 924 of said case-made.

Wherefore plaintiff in error prays that said judgment be reversed and set aside, and for judgment in its favor against the plaintiff below.

M. A. LOW,
W. F. EVANS, AND
J. E. DOLMAN,
Attorneys for Plaintiff in Error.

Filed Jul 15, 1895.

C. J. BROWN,
Clerk Sup. Court.

1 EXHIBIT "A" TO PETITION IN ERROR OF S. H. H. CLARK ET AL., AS RECEIVERS, ETC.

In the District Court in and for Clay County, State of Kansas.

LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Plaintiff,
v.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants.

Be it remembered that heretofore, to wit, on the 26th day of January, 1894, said plaintiff, Lissa Martin, administratrix of the estate of William Martin, deceased, commenced this action against these defendants, The Chicago, Rock Island and Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, by filing in the office of the clerk of the district court of Clay county, State of Kansas, her petition, which is in words and figures following, to wit:

2 STATE OF KANSAS, } ss:
Clay County, }

In the District Court.

LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and S. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants. } Petition.

Plaintiff, for a cause of action against said defendants, says:

That on the second day of January, 1894, William Martin departed this life at the county of Leavenworth and State of Kansas; that at the time of his death he was an inhabitant and resident of the county of Clay, in said State of Kansas, and also the owner and possessor of certain personal property in said county and State.

Plaintiff further avers that on the 18th day of January, 1894, she, who was then and is now the widow of the said William Martin, deceased, was duly appointed administratrix of the estate of the said William Martin by the probate court of Clay county, Kansas, and that on the said 18th day of January, 1894, she duly qualified as such administratrix, as required by law, and that at the time of filing this petition she was and is the duly appointed, qualified, and acting administratrix of the estate of said William Martin, deceased.

Plaintiff further alleges that at his death the said William Martin left the following-named heirs, all of whom are now living,
3 at the time of filing this petition, viz: This plaintiff, his widow; a son 11 years old, named Alva R.; a daughter 9 years old, named Orpha G., and a son 5 years old, named Harley S.

Plaintiff further avers that the above-named defendant, The Chicago, Rock Island and Pacific Railway Company, is a corporation organized under the laws of the State of Illinois and doing business in the State of Kansas under and by virtue of the laws of the said State of Kansas, and for all business purposes a citizen of the State of Kansas.

Plaintiff further avers that the defendant last above named is the owner of a line of railway running from the city of St. Joseph, in the State of Missouri, westward entirely through the State of Kansas into the State of Colorado; that in connection with said line so owned, as aforesaid, by said defendant it has leased from the Union Pacific Railway Company its line of road extending from Kansas City, in the State of Missouri, westward to the city of Topeka, in the State of Kansas, where it connects with the aforesaid line owned by the said defendant company, and that said defendant operates said leased line in connection with the line owned, as aforesaid, by it, running trains over said line into and out of the said Kansas City into the said State of Kansas and into and through Clay county, in said State of Kansas; that said defendant's line of railway in its

course through the State of Kansas passes through the county of Clay, in said State; that said leased line, as aforesaid, is used and operated by the said defendant last named and also by the defendants the receivers of the Union Pacific Railway Company,
4 both of said defendants doing business and running trains over the same line of road, as aforesaid.

Plaintiff further alleges that the Union Pacific Railway Company is a corporation doing business in the State of Kansas under and by virtue of the laws of the said State of Kansas and for all purposes of business a citizen of the said State; that the said Union Pacific Railway Company is the owner of a line of railway running from the city of Kansas City, in the State of Missouri, entirely through the State of Kansas and into the State of Colorado; that up to a period within the year 1893 the said Union Pacific Railway Company operated said line of railway, running trains, both freight and passenger, over said line; that at the same time and as a part of its system of railways in the State of Kansas the said Union Pacific Railway Company used and operated a line of railway running from the city of Junction City, in said State of Kansas, a point located on the aforesaid main line of said road in said State, to the city of Belleville, in said State, and that said line in its course runs entirely through the county of Clay, in said State of Kansas; that said last-mentioned line was used in connection with and as a feeder to the main line aforementioned.

Plaintiff further avers that on the — day of ——, 1893, by order and decree of the circuit court of the United States in and for the district of Nebraska, the above-named defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, were duly appointed, according to law, receivers
5 of the Union Pacific Railway Company; that long prior to the 2d day of January, 1894, each of said defendants had qualified, as provided by law, as such receivers, as aforesaid, and were long before said last-mentioned date in full possession of all the lines of road belonging to the said The Union Pacific Railway Company, including the aforementioned lines in the State of Kansas, and were, on the said second day of January, 1894, operating said lines in Kansas, including the one running through the county of Clay, in said State, and also the line leading from Kansas City westward to and through the city of Topeka, as heretofore referred to as being under lease to and operated by the defendant The Chicago, Rock Island and Pacific Railway Company.

Plaintiff further avers that on the said second day of January, 1894, her decedent, the said William Martin, was a passenger aboard one of the freight trains then being run by the above-named defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as aforesaid, between the city of Topeka, Kansas, and the city of Kansas City, in the State of Missouri; that by and with the consent of the said defendants and at their special solicitation and request and with their knowledge and consent and in the usual course of his and their business the said decedent was

lawfully a passenger aboard the said train, traveling to Kansas City, as aforesaid, in the caboose attached to said freight train so being at the time operated and run by said defendants as receivers, as aforesaid.

Plaintiff avers that at the same time, to wit, on the second
6 day of January, 1894, the defendants The Chicago, Rock Island and Pacific Railway Company was engaged in operating said line, as above mentioned as being regularly used and operated by it, in running one of its freight trains from the west toward Kansas City, Missouri, and that while the said decedent was, as aforesaid, a lawful passenger aboard the said train of the said defendant receivers, and without any fault or negligence on his part, and because of the gross and wanton negligence on the part of both, all, and each of said defendants, and because of the gross and wanton negligence of the agents of all of said defendants, and because of the gross and wanton negligence of the men in the employ of each and all of said defendants in operating both of said trains, and because of the want of ordinary care and skill in moving and operating both of said trains at and near the town of Linwood, in the county of Leavenworth, in the State of Kansas, there occurred between said trains what is commonly called "a rear-end collision"—the engine of the train of the defendant The Chicago, Rock Island and Pacific Railway Company ran into and telescoped the caboose of the train run and operated by the defendants receivers, as aforesaid—which said collision resulted in the death of plaintiff's decedent, the said William Martin.

Plaintiff therefore alleges that the said defendants, The Chicago, Rock Island and Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, as aforesaid, did negligently, carelessly, wantonly, and unlawfully
7 cause the death of plaintiff's decedent, the said William Martin, to the damage of plaintiff as administratrix, as aforesaid, in the sum of $10,000.00, ten thousand dollars.

Plaintiff therefore prays for judgment against the said defendants, jointly and severally, for the sum of ten thousand dollars, for costs of suit, and other proper relief.

DAWES & DURRIN,
Attorneys for Plaintiff.

On the back of said petition, omitting the title of said cause, appears the following endorsement: Filed Jan. 26, 1894. J. W. Smith, clerk.

That thereafter, to wit, on the 14th day of February, 1894, said defendant, The Chicago, Rock Island and Pacific Railway Company, filed in said court its answer to said petition; which answer is in words and figures as follows, to wit:

8 In the District Court in and for Clay County, Kansas.

LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants. } Answer.

Comes now the above-named defendant, The Chicago, Rock Island and Pacific Railway Company, and for answer to plaintiff's petition filed herein denies all and singular the allegations therein contained.

And having fully answered, defendant asks to be discharged hence with its costs in this behalf laid out and expended.

W. F. EVANS AND
HARKNESS & GODARD,
Attorneys for Defendant The Chicago, Rock Island and Pacific Railway Company.

On the back of said answer, omitting the title of said cause, appears the following endorsement: Filed Feb. 14, 1894. J. W. Smith, clerk.

9 That thereafter, to wit, on the 20th day of February, 1894, and before the time had expired in which to answer or plead to said plaintiff's petition, the said defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, filed with the clerk of said court their petition and bond praying for the removal of said cause to the United States circuit court for the district of Kansas; which said petition and bond for removal are in words and figures as follows, to wit:

10 In the District Court of Clay County, Kansas.

LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, Receivers of the Union Pacific Railway Company, Defendants.

Petition for Removal to the Circuit Court of the United States for the District of Kansas (First Division).

To said district court:

Your petitioners, the above-named S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and Frederic R. Coudert, receivers, defendants in the above-entitled cause, respectfully show

to this honorable court that the matter and amount in dispute in said cause exceeds, exclusive of interest and costs, the sum or value of five thousand dollars.

Your petitioners further allege that the said S. H. H. Clark, Oliver W. Mink, and E. Ellery Anderson were, upon the 13th day of October, 1893, appointed receivers of the Union Pacific Railway Company by the circuit court of the United States for the district of Nebraska; that they were appointed ancillary receivers of said Union Pacific Railway Company by the circuit court of the United States for the district of Kansas upon the same day; that thereafter, upon, to wit, the 13th day of November, 1893, J. W. Doane and Frederic R. Coudert were appointed additional receivers of said Union Pacific Railway Company by said United States circ-
11 cuit court for the district of Nebraska, and thereafter, to wit, upon the 27th day of November, 1893, said J. W. Doane and F. R. Coudert were appointed additional ancillary receivers of said railway company by the United States circuit court for the district of Kansas.

That immediately after their respective appointments as receivers of said railway company they qualified as such receivers and entered upon the discharge of their duties as such, and have been in the exclusive possession and control of the trains and other property of said Union Pacific Railway Company since their appointment as receivers as aforesaid.

Your petitioners further show to the court that said Union Pacific Railway Company was at the time of the commencement of this suit and still is a corporation created by the consolidation of the Union Pacific Railroad Company, created and existing under an act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1, 1862; the Kansas Pacific Railway Company, mentioned in said act of Congress as the Leavenworth, Pawnee and Western Railroad Company, a corporation created under the laws of Kansas, organized and operating its railroads in said State and a citizen thereof, and the Denver Pacific Railway and Telegraph Company, a corporation created by virtue of the laws of Colorado, operating a road in that State and a citizen thereof, such consolidation having been made by virtue of the authority contained in said act of Congress and amend-
ments thereto and other acts of Congress authorizing the same;
12 that said S. H. H. Clark is and was at the time of the commencement of this action a citizen of the State of Missouri; that said Oliver W. Mink is and was at the time of the commencement of this action a citizen of the State of Massachusetts; that said E. Ellery Anderson is and was at the time of the commencement of this action a citizen of the State of New York; that said J. W. Doane is and was at the time of the commencement of this action a citizen of the State of Illinois; that said F. R. Coudert is and was at the time of the commencement of this action a citizen of the State of New York; that the said plaintiff is and was at the time of the

commencement of this action a citizen of the State of Kansas; that said Chicago, Rock Island and Pacific Railway Company is and was at the time of the commencement of this action a corporation organized and existing under the laws of the States of Illinois and Iowa and a citizen of said States.

Your petitioners further allege that the controversy in said suit is one between your petitioner-and said Lissa Martin, administratrix, plaintiff, and that said suit is one arising under the laws of the United States.

Your petitioners offer herewith a bond, with good and sufficient surety, for their entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners pray this honorable court to proceed no further herein except to make the order of removal required
13 by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States for the district of Kansas, first division; and they will ever pray.

A. L. WILLIAMS,
N. H. LOOMIS,
R. W. BLAIR,
Attorneys for Petitioners.

STATE OF KANSAS, } ss:
Shawnee County, }

I, R. W. Blair, being duly sworn, do say that I am one of the attorneys for the petitioners in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

R. W. BLAIR.

Subscribed in my presence and sworn to before me this 20th day of February, 1894.

FRANK E. SMITH,
Notary Public.

[SEAL.]

My commission expires Feb'y 27, 1894.

14 Know all men by these presents that John R. Mulvane and Hiram P. Dillon, of the State of Kansas, are held and firmly bound unto Lissa Martin, administratrix, in the penal sum of one thousand dollars, lawful money of the United States; for the payment of which sum, well and truly to be made, unto said Lissa Martin, her heirs, executors, successors, administrators, and assigns, we bind ourselves, our heirs, executors, administrators, and assigns, severally and jointly, firmly by these presents, yet upon the conditions that—

Whereas S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson,

J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, having petitioned the district court of Clay county, State of Kansas, for the removal of a certain cause therein pending wherein Lissa Martin is plaintiff and The Chicago, Rock Island and Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert are defendants, to the circuit court of the United States in and for the district of Kansas, first division:

Now, if the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, your petitioners, shall enter into said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands and seals this 20th day of February, 1894.

JOHN R. MULVANE.
HIRAM P. DILLON.

15 STATE OF KANSAS, } ss:
Shawnee County, }

I, John R. Mulvane, of said county and State, one of the sureties named in the foregoing bond, do depose and say that I am a resident of the State of Kansas and a property-holder therein; that I am worth the sum of $2,000.00 over and above all my debts and liabilities, exclusive of property exempt from execution; that I have property in the State of Kansas liable to execution of the value of $2,000.00.

JOHN R. MULVANE.

Subscribed in my presence and sworn to before me this 20th day of February, 1894.

FRANK E. SMITH,
[SEAL.] *Notary Public.*

My commission expires Feb. 27, 1894.

STATE OF KANSAS, } ss:
Shawnee County, }

I, Hiram P. Dillon, of said county and State, one of the sureties named in the foregoing bond, do depose and say that I am a resident of the State of Kansas and a property-holder therein; that I am worth the sum of $2,000.00 over and above all my debts and liabilities, exclusive of property exempt from execution; that I have property in the State of Kansas liable to execution of the value of $2,000.00.

HIRAM P. DILLON.

Subscribed in my presence and sworn to before me this 20th day of February, 1894.

FRANK E. SMITH,
[SEAL.] *Notary Public.*

My commission expires February 27, 1894.

On the back of said petition and bond for removal, omitting the title of said cause, appears the following endorsement: Filed Feb. 20, 1894. J. W. Smith, clerk, by Newton Allen, dep'y.

16 That thereafter, to wit, on the 13 day of March, 1894, said petition of said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, coming on to be heard before said court, after due consideration by said court and argument of counsel, said petition and prayer for the removal of said cause to the circuit court of the United States for the district of Kansas was by the court refused; to which action of the court in refusing to grant the removal of said cause, as aforesaid, said defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, then and there duly excepted.

Following is a copy of journal entry relating to the overruling of the application of said receivers for the removal of said cause:

LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doan, and Frederic R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants.

On this 13th day of March, A. D. 1894, and at the March, 1894, term of this court, comes the said plaintiff, by Dawes & Durren, her attorneys, and come the said defendant, The Chicago, Rock Island & Pacific Railway Company, by W. F. Evans, J. E. Dolman, and Harkness & Godard, its attorneys, and the defendants S. H. H Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doan, and Frederic R. Coudert, as receiver of the Union Pacific Railway Company, by A. L. Williams, R. W. Blair, and C. C. Coleman, their attorneys, and thereupon this cause comes on to be heard upon the application of said defendant receivers of the Union Pacific Railway Company to remove this case to the circuit court; application is accompanied with a bond which the court finds is good and sufficient, and the court, on due consideration of said application and the arguments of counsel thereon, overrules and refuses said application; to which ruling and decision of the court the said defendants, the said receivers of the Union Pacific Railway Company, at the time duly excepted; whereupon it is ordered by the court that the said defendants, the *the* said receivers of the Union Pacific Railway Company, have twenty days from this day in which to file their answer in this

case, and that this case stand continued to the next term of this court.

That thereafter, to wit, on the 3d day of April, 1894, leave of court having been first had and obtained, said defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, filed their answer in said cause; which answer is in the words and figures following, to wit:

17-47 STATE OF KANSAS, }
Clay County, } *ss:*

In the District Court.

LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Defendants.

Separate answer of S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company.

Now come S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, and for their separate answer to the petition of plaintiff filed herein show to the court:

First. That this court has no jurisdiction of the matter in controversy in this suit, for the reason that these defendants at the proper time duly filed their petition and bond for the removal of this cause to the circuit court of the United States, district of Kansas.

Second. These defendants deny each and every allegation contained in plaintiff's petition.

A. L. WILLIAMS,
N. H. LOOMIS,
R. W. BLAIR,
Attorneys for Receivers of Union Pacific Railway Co.

On the back of said answer, omitting the title of said cause, appears the following endorsement: Filed Apr. 3, 1894. J. W. Smith, clerk.

48-972

FRIDAY, *June 21st*, 1894.

And thereupon the plaintiff, to maintain the issue on her part, offered the following evidence:

E. C. DUPLESSIS, being called on the part of the plaintiff and sworn, testifies as follows, to wit:

Direct examination by Mr. DAWES:

Q. What is your name?

Mr. LOOMIS: I desire to make the formal objection to the introduction of any testimony in this case, because the court has no jurisdiction of it, the receivers of the Union Pacific Railway Company having, prior to their answer day, filed a petition and bond for the removal of this case to the Federal court on account of a Federal question being involved, and for other reasons stated in the petition, and the fact that a transcript of the proceedings were filed in the Federal court as required by law.

Which objection was by the court overruled, the defendant The Receivers of the Union Pacific Railway Company at the time duly excepting.

The same objection as above to the introduction of any testimony in this case was made by the defendant The Chicago, Rock Island and Pacific Railway Company, and was by the court overruled, the said defendant at the time duly excepting.

* * * * * * *

973–996 STATE OF KANSAS, } ss:
Clay County, }

In the District Court.

LISSA MARTIN, Administratrix of the Estate of Wm. Martin, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO. ET AL., Defendants.

Verdict.

We, the jury empanelled and sworn in the above entitled case, do, upon our oaths, find for the plaintiff against the defendant The Chicago, Rock Island and Pacific Railway Company and the defendants The Receivers of the Union Pacific Railway Company, and we assess the amount of her recovery at $10,000.00.

WM. STERLING, *Foreman.*

On the back of said verdict, omitting the title of said cause, appears the following endorsement: Filed this 3 day of July, A. D. 1894. J. W. Smith, district clerk.

997 That on the 5th day of July, 1894, and after the filing of the motion last aforesaid, and during said June, 1894, term of said district court, and within the time allowed by law, said defendant, The Chicago, Rock Island and Pacific Railway Company, filed in said court its motion, in writing, for a new trial; which said motion is in words and figures as follows, to wit:

998 In the District Court within and for Clay County, State of Kansas.

LISSA MARTIN, Adm'x of the Estate of William Martin, Deceased, Plaintiff,
v.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants.
} Motion for a New Trial.

Comes now said defendant, The Chicago, Rock Island and Pacific Railway Company, and moves the court to set aside the verdict herein and grant this defendant a new trial for the following reasons:

1. Irregularity in proceedings of the court, jury, and plaintiff, by which this defendant was prevented from having a fair trial.
2. Misconduct of the jury.
3. Misconduct of the plaintiff.
4. Action and surprise which ordinary prudence could not have guarded against.
5. Excessive damages, appearing to have been given under the influence of passion and prejudice.
6. Error in assessment of the amount of recovery, the same being too large.
7. That the verdict of the jury is not sustained by sufficient evidence.
8. That the verdict of the jury is against the evidence.

999 9. That the verdict of the jury is against the weight of the evidence.

10. Error of law occurring at the trial and excepted to by this defendant at the time.
11. That the court erred in overruling the objections of this defendant to the trial of said cause.
12. That the court erred in overruling the objections of this defendant to the introduction of any evidence.
13. That the court erred in overruling the objections of this defendant to the introduction of any evidence under the allegations set out in plaintiff's petition.
14. That the court erred in overruling the objections of this defendant to incompetent and improper questions propounded to witnesses by the plaintiff.
15. That the court erred in overruling the objections of this defendant to improper and incompetent questions propounded to witnesses by defendants The Receivers of the Union Pacific Railway Company.
16. That the court erred in admitting incompetent and improper evidence over the objections of this defendant.
17. That the court erred in excluding competent and proper evidence offered by this defendant.

18. Under the pleadings and evidence in this case the plaintiff is not entitled to recover as against this defendant.

19. That the verdict of the jury should have been in favor of this defendant and against the plaintiff.

1000 20. That the court erred in overruling the application of defendants S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, for the removal of this action to the United States circuit court for the district of Kansas.

21. That this court has no jurisdiction of this action.

22. That this court has no jurisdiction of the parties to this action.

23. That the court erred in giving to the jury instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 12½, 13, 14, 15, 16, 17, 18, 19, and 20 of the instructions given to the jury, and erred in giving each of said instructions.

24. That the court erred in refusing to give to the jury instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of the instructions asked by defendant The Chicago, Rock Island and Pacific Railway Company, and erred in refusing to give each of said instructions.

25. That the court misdirected the jury on matters of law.

26. That the court erred in overruling the demurrer of this defendant after the close of the plaintiff's testimony.

27. That the court erred in admitting the evidence of the defendants The Receivers of the Union Pacific Railway Company in reference to the operation of the train mentioned in the evidence as number second thirty.

W. F. EVANS,
J. E. DOLMAN, AND
HARKNESS & GODARD,
Attorneys for Defendant The Chicago, Rock Island and Pacific Railway Co.

[Endorsed:] In the district court, Clay county, Kansas. Filed July 5, 1894. —— ——, clerk. —— ——, deputy.

1001 That thereafter, to wit, on the 17th day of July, 1894, and during said June, 1894, term of said district court, said motion of said defendant, The Chicago, Rock Island and Pacific Railway Company, for a new trial coming on to be heard, after argument of counsel and due consideration by the court, was by the court overruled; to which action of the court in overruling said motion of said defendant, The Chicago, Rock Island and Pacific Railway Company, for a new trial and in refusing to grant said defendant, The Chicago, Rock Island and Pacific Railway Company, a new trial, said defendant, The Chicago, Rock Island and Pacific Railway Company, then and there duly excepted at the time.

That thereafter, to wit, on the 5th day of July, 1894, and during said June, 1894, term of said district court and within the time allowed by law, said defendants, S. H. H. Clark, Oliver W. Mink,

E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, receivers of the Union Pacific Railway Company, filed in said court their motion, in writing, for a new trial; which said motion is in words and figures as follows, to wit:

1002 In the District Court of Clay County, Kansas.

LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Plaintiff, *vs.* THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Defendants.	Motion for New Trial.

Now come the above-named receivers of the Union Pacific Railway Company and move the court to set aside the verdict rendered against them herein and to grant a new trial of said cause for the following reasons, affecting materially the substantial rights of said receivers:

1. Irregularity in the proceedings of the court, jury, plaintiff, and the defendant The Chicago, Rock Island and Pacific Railway Company, orders of the court, and abuse of discretion, by which said receivers were prevented from having a fair trial.

2. Misconduct of the jury, plaintiff, and the defendant Chicago, Rock Island and Pacific Railway Company.

3. Accident or surprise which ordinary prudence could not have guarded against.

4. Excessive damages appearing to have been given under the influence of passion or prejudice.

5. Because the verdict against the receivers of the Union Pacific Railway Company is not sustained by sufficient evidence and is contrary to the evidence.

6. Because the verdict against the receivers of the Union Pacific Railway Company is contrary to law.

7. Because of errors of the court in admitting certain testi-
1003 mony offered by the plaintiff and by the defendant The Chicago, Rock Island and Pacific Railway Company over the objections and exceptions of said receivers of the Union Pacific Railway Company.

8. Because the court erred in refusing to admit certain testimony offered by said defendants, receivers of the Union Pacific Railway Company; to which rulings of the court in refusing to admit said testimony said receivers, defendants, duly objected and excepted at the time.

9. Because the court erred in giving to the jury certain instructions of its own motion; to the giving of which instructions said receivers at the time duly excepted.

10. Because the court erred in giving to the jury certain instruc-

tions requested by said Chicago, Rock Island and Pacific Railway Company, defendant; to the giving of which instructions said receivers duly excepted at the time.

11. Because the court erred in refusing to give to the jury certain instructions requested by said receivers; to which ruling of the court said receivers duly excepted at the time.

12. Because the court erred in submitting to the jury for answer certain interrogatories propounded by the said Chicago, Rock Island and Pacific Railway Company; to the submission of which interrogatories said receivers at the time duly excepted.

13. Because the court erred in refusing to submit to the jury for answer certain interrogatories propounded by said receivers of the Union Pacific Railway Company; to which refusal of the court to submit said questions said receivers duly excepted at the time.

1004 14. Newly discovered evidence material for said receivers, which they could not with reasonable diligence have discovered and produced at the trial.

15. Other errors of law not hereinbefore enumerated occurring at the trial and excepted to by said receivers at the time.

16. Because the court lost jurisdiction of said cause upon the filing by said receivers of their petition and bond for the removal of said case to the United States circuit court for the district of Kansas, and thereafter this court had no power to proceed with the trial of said case.

17. Because the court erred in refusing to sustain the application of said receivers for the removal of said cause to the United States circuit court for the district of Kansas.

Affidavits and other testimony will be used upon the hearing of this motion.

A. L. WILLIAMS,
C. C. COLEMAN,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Receivers of Union Pacific R'y Co.

On the back of said motion for a new trial, omitting the title of said cause, appears the following endorsement: Filed Jul 5, 1894. J. W. Smith, clerk.

1005 That thereafter, to wit, on the 17th day of July, 1894, and during said June, 1894, term of said district court, said motion of said defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coucert, receivers of the Union Pacific Railway Company, for a new trial coming on to be heard, after argument of counsel and due consideration by the court, was by the court overruled; to which action of the court in overruling said motion of said defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, receivers of the Union Pacific Railway Company, for a new trial, and in refusing to grant said defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R.

Coudert, receivers of the Union Pacific Railway Company, a new trial, said defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, receivers of the Union Pacific Railway Company, and each of them, then and there duly excepted at the time.

That thereafter and on the 17th day of July, 1894, and during said June, 1894, term of said district court, said district court proceeded to and did make and render judgment against said defendants, The Chicago, Rock Island and Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, receivers of the Union Pacific Railway Company, and against each of said defendants, in favor of said plaintiff for the sum of $10,000 and costs of suit, taxed at $—, the journal entry of which said judgment is in words and figures as follows, to wit:

1006 Page 455, Journal J, District Court, Clay County, Kansas.

LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants. } No. 3927.

And now, on this 17th day of July, 1894, comes the said plaintiff, by F. B. Dawes, her attorney, and comes the defendant The Chicago, Rock Island and Pacific Railway Company, by W. F. Evans, J. E. Dolman, and Valentine, Harkness & Godard, its attorneys, and come the defendants The Receivers of the Union Pacific Railway Company, by A. L. Williams, N. H. Loomis, R. W. Blair, J. H. Reeder, and C. C. Coleman, their attorneys; and thereupon this cause comes on to be heard upon the motion of the defendant The Chicago, Rock Island and Pacific Railway Company for judgment against the plaintiff upon the special findings of the jury herein, and the court, on due consideration of said motion and the arguments of counsel thereon, overruled said motion; to which ruling of the court the said defendant, The Chicago, Rock Island and Pacific Railway Company, at the time duly excepted. Thereupon this cause comes on to be heard on the motion of the defendant The Chicago, Rock Island and Pacific Railway Company for a new trial, and the court, after due consideration of said motion and the arguments of counsel thereon, overrules said motion; to which ruling of the court the said defendant, The Chicago, Rock Island and Pacific Railway Company, at the time duly excepted. Thereupon this cause comes on to be heard on the motion of the defendants The Receivers of the Union Pacific Railway Company
1007–1037 for a new trial, and the court, after having duly considered said motion and the arguments of counsel

thereon, overrules said motion; to which ruling of the court the said defendants, The Receivers of the Union Pacific Railway Company, at the time duly excepted. It is therefore considered, ordered, and adjudged by the court that the plaintiff, Lissa Martin, administratrix of the estate of William Martin, deceased, have and recover of and from the defendants, The Chicago, Rock Island and Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the Union Pacific Railway Company, the sum of ten thousand dollars, with interest thereon from this date, at the rate of six per cent. per annum, and the costs herein, taxed at $—.

And now, for good cause shown, it is ordered by the court that said defendants be both given one hundred and twenty days from this date in which to make and serve a case-made for the supreme court; that the plaintiff have twenty days thereafter in which to suggest amendments thereto, and that such case be settled on five days' notice by either party to the case, and it is further ordered by the court that execution for the collection of said judgment be, and the same is hereby, stayed until the expiration of the time given for the preparation of a case-made for the supreme court.

1038 *Journal Entry of Judgment.*

C., R. I. & P. R'L'Y Co. and S. H. H. CLARK, Receivers, etc., Pl'ffs in Error,
vs.
LISSA MARTIN, Adm'x, Def't in Error. } 10391.

This cause comes for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that plaintiffs in error pay the costs of this case in this court, taxed at — dollars, and hereof let execution issue.

1039 And also, on the 11th day of June, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a syllabus and opinion of the said supreme court in said cause, which is in words and figures as follows, to wit:

1040 THE CHICAGO, ROCK ISLAND & PACIFIC RAILway Company and S. H. H. Clark *et al.*, the Receivers of the Union Pacific Railway Company,
vs.
LISSA MARTIN, Administratrix. } No. 10381.

Error from Clay county. Affirmed.

Syllabus by the Court, Allen, J.

1. A judgment will not be reversed on account of the admission of incompetent evidence where the findings of the jury show that they have discredited such evidence and that the fact is contrary thereto.

2. In an action against the C., R. I. & P. R'y Co. and the receivers of the U. P. R'y Co. to recover damages for wrongfully causing the death of the plaintiff's intestate while a passenger on the train of the latter company, with which a train of the former collided, where the employees in charge of each train were charged with negligence, and through such negligence jointly causing the death, held, first, that after answer by the railway company the receivers are not entitled to remove the cause into the circuit court of the United States, either on the ground of diverse citizenship or that the case is one arising under the laws of the United States, without joinder in the petition for removal by their codefendant; held, second, that where the negligence of the servants of each defendant directly contributed to the death of plaintiff's intestate both are liable; held, third, that where both trains are being operated on the roadway of the U. P. Co. under an arrangement for the joint use of the track by both companies an instruction that it was the duty of the C., R. I. & P. Co. in the operation of its trains "to use all reasonably practi-
1041 cable care and caution as far as human foresight could go under the circumstances to prevent its trains from running into the trains of the receivers of the U. P. Co., which were being operated at the same time over the same track," does not impose too high a duty of care and diligence on the former company; held, fourth, where the culpable negligence of the employés of the receivers in charge of their train is clearly established by the special findings of the jury this court will not consider the question whether they are also chargeable with the negligence of the servants of the C., R. I. & P. Co.
3. The case of The C., R I. & P. R'y Co. *vs.* Groves approved and followed.
4. A stipulation in a stock pass on which the deceased was riding in terms limiting the liability of the receivers of the railway company for injuries to him resulting from the negligence of their servants does not limit the recovery of his administratrix for damages sustained by the widow and children through his death, for which a right of recovery is given to her by section 418, chapter 95, of the General Statutes 1897.

1042 THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY Company and S. H. H. Clark *et al.*, the Receivers of the Union Pacific Railway Company, } 10381.
vs.
LISSA MARTIN, Administratrix.

Error from Clay county. Affirmed.

The opinion of the court was delivered by ALLEN, J.:

This action grows out of a collision of a freight train of the Chicago, Rock Island and Pacific Railway Company with one of the

Union Pacific Company near Linwood, in Leavenworth county, on the 2nd of January, 1894, by which William Martin, the plaintiff's intestate, was killed. At the time of the collision six trains were moving eastward over the Union Pacific railway in close proximity to each other. They were designated as Union Pacific No. 14, Rock Island first 30, Union Pacific first 12, Rock Island second 30, Union Pacific second 12, and Rock Island No. 32. Union Pacific number 14 was in the lead, and the others followed in order as above stated. Martin was a passenger in charge of a car-load of stock on Union Pacific first 12. All these trains were running an hour or more behind their schedule time. The collision occurred at about 5.30 in the morning, at a point about three quarters of a mile west of Linwood station. Rock Island train second 30 ran into the rear end of Union Pacific first 12. Westward from the point of collision the track is straight for a distance of 960 feet; thence there is a slight curve to the right for about 306 feet. From the end of this curve it is a tangent for about 6,500 feet. The collision occurred before daylight on a clear starlight night. It appears that the trains of the Rock Island Company were operated over the line of the Union Pacific Company between Topeka and Kansas City under some kind of a lease, which was not introduced in evidence.

1043 Rules governing the movement of trains were promulgated by the Union Pacific Company, and the telegraph operators and train despatchers were employed by that company, but the trainmen on the Rock Island trains were employed by the Rock Island Company. The plaintiff charged negligence in the management of both the colliding trains. The fact that the plaintiff's intestate was killed in the collision was conceded, and there was no serious dispute over the proposition that it resulted from the negligence of the employés in charge of one or the other or both of the trains. Each defendant, however, denied its own liability and sought to cast the responsibility on the other. The jury rendered a verdict against both for $10,000, on which judgment was entered. They also returned answers to special questions submitted on behalf of each company. In answer to questions submitted on behalf of the Rock Island Company, the jury found most of the facts as above stated, and also that as Union Pacific train number 14 passed it left a burning fusee at or near the west end of the curve above mentioned as a signal to the following train to stop; that Rock Island train number first 30 answered the signal, and in turn also placed a burning fusee at or near the same point as a signal to Union Pacific train number first 12 to stop; that Quick, the engineer of the last-mentioned train, saw the fusee at a distance of a mile and a half away; that it was his duty to answer the signal by two short blasts of the whistle; that he did not answer it in any manner; that if it had been answered it would then have been the duty of the conductor and rear brakeman to at once ascertain what signal he was answering; that they could have ascertained what it was in time to protect the rear end of their train by proper signals; that the rules of the company required an engineer seeing a burning fusee on the track to bring his train to a

full stop before reaching the fusee and not proceed until it
1044 should be burned out; that Quick did not stop his train, but ran on over the fusee in violation of the rules; that if Quick had performed his duty by stopping and giving the signals, and if the conductor and rear brakeman had given proper signals to protect the rear of the train, the persons operating the second sections of Rock Island number 30 could have seen these signals in time to have avoided the collision; that Union Pacific first 12 also ran over and exploded two torpedoes which had been placed on the track as additional warning; that on approaching the burning fusee and before passing over the same the trainmen on the Union Pacific first 12 did not send out a flagman nor give any signal to protect the rear of the train from a collision with the following train; that the rules of the Union Pacific Railway Company prescribe the manner in which signals should be used and obeyed by all trains on its road between Kansas City and Topeka, and that the persons employed on the trains of the Rock Island Company while on the Union Pacific track received all orders for the government and operation of the trains from the receivers of the Union Pacific Company. In answer to special questions submitted by the receivers, the jury found that the collision occurred about 1,266 feet east of the west point of the curve before mentioned; that the track was straight from the west point of the curve for a distance of about a mile and a quarter; that an engineer on a locomotive situated at the west end of this straight piece of track could have had an unobstructed view of the tail lights on a train located at any point east of him on the straight piece of track, and that the employés of the Rock Island Company on train second 30 could have had an unobstructed and continuous view of the tail lights of Union Pacific train number first 12 for a distance of about a mile and a half west of the point of collision; that the Rock Island train could have been stopped
1045 within from 900 to 1,100 feet from the place where the engineer first saw the tail lights of the Union Pacific train; that he saw the tail lights when within about 1,400 feet of the train; that both the front and rear brakemen of the Rock Island train saw the tail lights when the trains were still further apart, and that the train ran twice its length after the rear brakeman saw the tail lights before he called the attention of any one to the train ahead; that the Union Pacific train was running at the rate of about ten miles an hour and the Rock Island train about eighteen miles an hour at the time of collision; that within a couple of seconds after the engineer of the Rock Island train saw the tail lights ahead of him he saw a lantern swung across the track from the rear of the Union Pacific caboose, which was a signal to him to stop; that he did not answer this signal; that Duplessis, the Rock Island engineer, knew that Linwood was a station where trains were in the habit of taking water and where telegraphic orders for the movements of trains were given; that he knew three trains were just preceding him, one or all of which were liable to stop at Linwood; that it was the duty of the trainmen in charge of the Rock Island train to approach Linwood station carefully and with their train under control; that they

were chargeable with negligence in the operation of the train which contributed directly to the collision and the death of the plaintiff; that the train was in charge of Rock Island employés, pulled by a Rock Island locomotive, and that the officials of the Union Pacific did not have anything to do with the movement of the train other than giving orders directing when the train should leave stations; that the Rock Island Company had, and the receivers had not, power to employ and discharge the trainmen operating Rock Island trains over that track.

1046 Separate petitions in error are filed in this court by the Rock Island Company and the receivers of the Union Pacific Company charging numerous errors, and elaborate briefs are presented on behalf of each, discussing at length the errors alleged. The points appearing worthy of mention in the opinion will be discussed in the order of their statement in the briefs, beginning with those urged by counsel for the Rock Island. The first complaint is of the admission, as a deposition of the absent witness, A. T. Palmer, of the affidavit for a continuance made by R. W. Blair. The statements in the affidavit tended to exculpate the employés in charge of the Union Pacific train from the charge of negligence and to prove that the engineer in charge of the Rock Island train could have seen the tail lights of the Union Pacific train in time to have prevented the collision. Some of the statements are in the form of conclusions, and it is urged that they were objectionable both in form and substance. The answers returned by the jury to the special questions, however, show that the jury gave no credence to this testimony, so far as it tended to exculpate the Union Pacific employés, for they found the facts to be contrary to the statements in the affidavit. The statement as to the distance at which tail lights could be seen was not necessarily an opinion. By observation the witness might have been and probably was able to testify from his own knowledge. The testimony of D. C. Bevard and W. E. Donnelly, set out in the brief, appears to be objectionable in form, but the jury, in their special findings, show that they did not accept it as true, for they found against the statements made by these witnesses. The testimony of Whittaker, of which complaint is made, is quite unimportant. There was no error in the admission of the American mortality tables. They were shown to be in use and are recognized as competent evidence to prove the expectancy of human life.

1047 Complaint is made of the following instruction:

"10th. It was the duty of the Chicago, Rock Island and Pacific Railway Company in the operation of its trains over the track of the Union Pacific Railway Company between Topeka and Kansas City, with the permission of or under some arrangement with the receivers of the said Union Pacific Company, to see that they were managed and run with reference to all known or reasonably to be anticipated surroundings, and to use all reasonably practicable care and caution as far as human foresight could go under the circumstances to prevent its trains from running into the trains of the receivers of the Union Pacific Railway Company, which

were being operated at the same time over the same track. The want of such care and caution on the part of the servants and employés of the Chicago, Rock Island & Pacific Railway Company, whom it had placed in charge and control of any of its said trains, would be negligence on the part of said company."

In criticism of this instruction it is urged that the deceased was not a passenger of the Rock Island Company, and that it owed toward him no greater duty than that of ordinary care; that this instruction imposed on it a much higher degree of diligence and made it bound to use "all reasonably practicable care and caution as far as human foresight could go under the circumstances." It is contended also that this instruction imposed liability on the Rock Island Company for the negligence or mismanagement of the employés of the Union Pacific Company, who directed the operation of the train. Where two railroad companies operate their trains over the same track and in the manner shown in this case, the measure of care to be exercised by the employés of one company to prevent injuries to passengers on the trains of the other, stated in this instruction, is not too great. It is not greater than a person of ordinary prudence would exercise under the circumstances.

1048 The consequences necessarily resulting from collisions of railroad trains are of such moment that trainmen, knowing their proximity, are bound to be constantly on the alert and to exercise the utmost vigilance and promptness in avoiding and preventing such collisions. Common prudence requires this. This instruction does not impose an exceptional or extraordinary vigilance on this particular occasion, but simply requires the exercise of such vigilance as should be exacted of all employés on all trains under like circumstances. In the first paragraph of the instructions the court informed the jury that the occasion and cause of the death of William Martin, as claimed by plaintiff, are stated in detail in the petition filed by her, which had been read in your hearing and which you may take with you when you go to your jury-room. It is said that it is the duty of the court to construe the pleadings and to state to the jury the issues of fact to be tried by them, and that it is error to send the pleadings into the jury-room for the jury to read. This contention is sound, but it does not avail the plaintiff in error, for the court instructed the jury fully and clearly as to the issues to be tried, and the record does not show that the pleadings were in fact taken by the jury to their room. A similar criticism is made of the instructions with reference to the rules, though nothing was said about their being sent out with the jury. The claim is, however, that the jury were left to construe them as well as to determine their applicability to the facts of the case. The rules were promulgated by the Union Pacific Railway Company for the guidance of their trainmen. Those read in evidence were very clear and explicit. It is not apparent that the court by construction could have afforded the jury any additional light on their meaning. Our attention is not called to any point requiring construction by the court. The jury were rightly told

that it was for them to determine the applicability of the
1049 rules to the circumstances shown to exist by the evidence.
There is no merit in the criticism of the 13th instruction. Much stress is laid on the refusal of the court to give the second instruction asked by the Rock Island Company, which was to the effect that if the jury found from the evidence that the train second 30 was exclusively controlled and operated under the orders of the receivers, the receivers would alone be responsible for their conduct, even though they believed that the trainmen were employed and paid by the Rock Island Company. This contention has been decided adversely to the plaintiff in error in the case of The Chicago, Rock Island & Pacific R'y Company *vs.* Groves, 56 Kan., 601, with which we are entirely satisfied.

On behalf of the receivers the first contention is that a petition and bond for a removal of the cause to the circuit court of the United States for the district of Kansas was duly filed and the bond approved, but the court refused to order the removal, and that the court thereby lost jurisdiction and thereafter had no power to proceed. The answer of the Rock Island Company was filed on the 14th of February. The petition and bond of the receivers for removal were filed on the 20th of the same month. The Rock Island Company did not join in the application for removal, but it is now insisted by this company, as well as by the receivers, that the district court lost jurisdiction by the filing of the petition and bond. It is said that the Union Pacific Railway Company has a right to remove causes from the State to the Federal courts by reason of a Federal court question being involved; that its receivers have a right to remove because of their appointment by the Federal court. It is contended that conceding the right of the plaintiff to sue both defendants jointly, the receivers have a right to remove without being joined in the petition by the Rock Island Company, because the removal is based on the ground that a Federal question is in-
volved. It is conceded that if a right of removal had been
1050 claimed solely on the ground of citizenship it would have been necessary for all the defendants to join, but being based on the proposition that a Federal question was involved, it is claimed that such joinder was unnecessary. In support of this claim the following cases are cited: Ames *vs.* Union Pacific, 111 U. S., 449; Pacific Removal Cases, 115 U. S., 1; Mitchell *vs.* Smale, 140 U. S., 406; R'y Co. *vs.* Cox, 145 U. S., 593; Texas & Pacific R'y Co. *vs.* Cody, 116 U. S., 606, and 17 Supreme Court Reporter, 703; Evans *vs.* Dillingham, 43 Federal, 177; Seattle, &c., R'y Co. *vs.* State, 52 Federal, 596; Trust Company *vs.* R'y Co., 59 Federal, 523; Southern Pac. R'y Co. *vs.* Townsend, 62 Federal, 161; Landers *vs.* Felton, 73 Federal, 311; Lund *vs.* The C., R. I. & P. R'y Co., 78 Federal, 385. The only ones of the cases cited that seem to us to support this contention are those from the 52 and 78 Federal Reporter. Our own construction of the Federal statute on the subject (section 2, page 612, Supplement to the Revised Statutes of the United States) is that it was necessary for both defendants to join in the petition for a removal. They were charged with jointly causing the death of the plaintiff's intes-

tate. The controversy was not separable and the receivers alone had no right to removal on the ground that a Federal question was involved. No Federal question was in fact presented by the pleadings nor litigated at the trial. It was the ordinary action under our statute for wrongfully causing the death of the plaintiff's intestate. In the view that both defendants must join in the petition for removal we are supported by able Federal judges in the cases of Thompson *vs.* C., St. P. & K. C. R'y Co., 60 Federal, 773; Shearing *vs.* Trumbull, 73 Federal, 33, and by Texas & Pac. R'y Co. *vs.* Young, 27 S. W., 145; Black's Dillon on Removal of Causes, section 77.

The deceased was riding on what is denominated a stock pass, which contained the following provision:

1051 "This ticket is not issued to the holder hereof as a passenger, but is issued at his special instance and request in order to enable him to accompany a stock shipment on a freight or stock train in order to care for the stock en route, and the holder hereof agrees that the company shall not be liable to him in any manner as a passenger, nor for any accident resulting to him from the operation of the train in which he rides, or from the manner of handling the same by the employés of the company, and he further agrees that the company shall not be liable to him for injury to the person or property of the person using this ticket, unless the same is caused by the gross negligence of the company, and he further agrees that in no case shall the liability of the company exceed the sum of $1,000." The verdict was for $10,000. Both plaintiffs in error claimed the benefit of this limitation as to liability. This action is not prosecuted by Martin himself, nor by his administratrix for the benefit of his general estate. It is an action instituted by his widow as administratrix under section 418, General Statutes of 1897, for the benefit of herself and the children of the deceased. It is to recover their damages resulting from the death of the husband and father. It is to recover for the injury to them rather than to the deceased. Against their rights the deceased had no authority to contract. The cause of action for which the plaintiff sues never accrued to him. It could only accrue as a result of his death. His stipulation, even if binding on himself, is no defense against the statutory right of the plaintiff.

There was abundant proof of negligence on the part of the employés of the receivers in charge of the train on which the plaintiff was riding, and the findings of the jury sustain the judgment against them. The fact that the crew of the Rock Island train were also negligent has no tendency to exonerate the receivers. The

1052 jury have pointed out specific acts of negligence of the engineer, conductor, and brakeman on the Union Pacific train which directly contributed to the collision. This being so, the receivers are liable wholly without reference to the question whether they are also responsible for the negligence of the crew on the Rock Island train. The other questions do not appear to be of sufficient importance to require elaboration here. The liability of both companies was established at the trial. No error is disclosed which could have affected the verdict. That both train crews were careless

and failed to take reasonable precautions in the management of their trains is clearly and abundantly shown.

The judgment is affirmed.

All the justices concurring.

A true copy.

Attest:

——— ———,
Clerk Supreme Court.

1053 And afterwards, on the 1st day of August, 1898, the same being one of the regular judicial days of the July term, A. D. 1898, of the supreme court of the State of Kansas, the said court being in session at the supreme court room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice, and the Honorable Wm. A. Johnston, and the Honorable Stephen H. Allen, and John Martin, Esq., clerk of said court, the following proceedings were had and entered of record, to wit:

1054 *Journal Entry of Consolidation.*

In the Supreme Court of the State of Kansas.

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs in Error, *vs.* Lissa Martin, Administratrix of the Estate of William Martin, Deceased, and The Chicago, Rock Island & Pacific Railway Company, Defendants in Error.	No. 10381.
The Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error, *vs.* Lissa Martin, Administratrix of the Estate of William Martin, Deceased, and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants in Error.	No. 10382.

It is by the court ordered that the above-entitled causes be consolidated under the title of "The Chicago, Rock Island & Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* Lissa Martin, administratrix of the estate of William Martin, deceased, defendant in error."

It is further ordered by the court that this entry be made *nunc pro tunc* as of the 3rd day of May, 1898.

1055 And afterward, on the 2nd day of August, 1898, there was filed in the office of the clerk of the supreme court of

the State of Kansas a petition for writ of error, which, with the endorsements thereon, is in words and figures as follows, to wit:

1056 In the Supreme Court of the State of Kansas.

THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs in Error, *vs.* LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Defendant in Error.	Petition for Writ of Error.

Now come The Chicago, Rock Island and Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs in error herein, and say that on or about the 11th day of June, 1898, this court entered judgment herein in favor of Lissa Martin, administratrix of the estate of William Martin, deceased, defendant in error, and against these plaintiffs in error, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of these plaintiffs in error, all of which will more in detail appear from the assignment of errors which is filed with this petition in error.

Wherefore these plaintiffs in error pray that a writ of error may be allowed in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

M. A. LOW,
W. F. EVANS,
A. L. WILLIAMS, &
N. H. LOOMIS,
Attorneys for Plaintiffs in Error.

1057 [Endorsed:] 10381. In the supreme court of the State of Kansas. Chicago, R. I. & Pac. R'y Co. and S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* Lissa Martin, administratrix, defendants in error. Petition for writ of error. Filed Aug. 2, 1898. Jno. Martin, clerk supreme court.

1058 And also on the 2nd day of August, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas an assignment of errors, which, with the endorsements thereon, is in words and figures as follows, to wit:

1059 In the Supreme Court of the State of Kansas.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs in Error, *vs.* LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Defendant in Error.	Assignment of Errors.

The Chicago, Rock Island and Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, plaintiffs in error herein, in connection with their petition for a writ of error, make the following assignment of errors, which, they aver, appear in the record in this cause, to wit:

First.

The said supreme court of the State of Kansas erred in affirming the judgment of the lower court.

Second.

The said supreme court of the State of Kansas erred in failing and refusing to reverse the judgment of the lower court.

Third.

The said supreme court of the State of Kansas erred in holding that the State court had jurisdiction of said cause after the receivers of the Union Pacific Railway Company had filed a proper petition and bond for the removal thereof to the circuit court of the United States for the district of Kansas.

1060 Fourth.

The said supreme court of the State of Kansas erred in holding that the receivers of the Union Pacific Railway Company who were appointed by and acting under orders of a Federal court and in charge of property belonging to a Federal corporation could not remove a case brought against said receivers and the Chicago, Rock Island & Pacific Railway Company to the Federal court, where the controversy was not a seperable one, without being joined in the application for removal by their codefendant, the said Chicago, Rock Island & Pacific Railway Company.

Fifth.

The said supreme court of the State of Kansas erred in holding that in a case involving a Federal question wherein the amount in controversy, exclusive of interest and costs, was more than the sum of two thousand dollars, a removal could not be had to the Federal

court, where the controversy was not a separable one, unless all the parties defendant joined in the application for removal.

Sixth.

The said supreme court of the State of Kansas erred in holding and deciding that the State court had jurisdiction to try said cause.

Seventh.

The said supreme court of the State of Kansas erred in holding and deciding that the petition and bond of the receivers of the Union Pacific Railway Company for the removal of said action to the United States circuit court did not deprive the State court of jurisdiction to try said case.

M. A. LOW &
W. F. EVANS,
A. L. WILLIAMS &
N. H. LOOMIS,
Attorneys for Plaintiffs in Error.

1061 [Endorsed:] 10381. In supreme ct. of Kansas. Chicago, R. I. & Pac. R'y Co. and S. H. H. Clark *et al.*, as receivers U. P. R'y Co., *vs.* Lissa Martin, as adm'x. Assignment of errors. Filed Aug. 2, 1898. Jno. Martin, clerk supreme court.

1062 And also on the 2nd day of August, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for reversal, which, with the endorsements thereon, is in words and figures as follows, to wit:

1063 In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND & PACIFIC Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs in Error, *vs.* LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Defendant in Error.	Petition for Reversal.

The Chicago, Rock Island and Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, in connection with their petition for a writ of error and their assignment of errors, entitled and filed in this cause in the supreme court of the State of Kansas, pray that the judgment rendered against them in the supreme court of the State of Kansas on or about the 11th day of June, 1898, may be reversed, annulled, and

altogether held for nothing, and that they may be restored to all things which they have lost by reason of such judgment.

M. A. LOW,
W. F. EVANS,
A. L. WILLIAMS, &
N. H. LOOMIS,
Attorneys for Plaintiffs in Error.

1064 [Endorsed:] 10381. In the Supreme Court of the United States. Chicago, R. I. & Pac. R'y Co. and S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* Lissa Martin, adm'x, defendants in error. Petition for reversal. Filed Aug. 2, 1898. Jno. Martin, clerk supreme court.

1065 Be it remembered that on Tuesday, the 2nd day of August, 1898, before the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas, at his chambers in the city of Topeka, the following proceeding was had and entered of record, as follows, to wit:

1066 In the Supreme Court of the State of Kansas.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs in Error,
vs.
LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Defendant in Error.

Journal Entry.

Upon this day come The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, by M. A. Low and W. F. Evans, its attorneys, and also come S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, plaintiffs in error, by A. L. Williams, their attorney, and present to the undersigned chief justice of the supreme court of the State of Kansas their petition herein praying for the allowance of a writ of error in the above-entitled cause to the Supreme Court of the United States for the correction of certain errors complained of and more fully set forth in the assignment of errors accompanying said petition for a writ of error.

Upon consideration whereof it is hereby ordered that the said petition be, and the same is hereby, granted, and the said writ of error allowed. The said plaintiffs in error thereupon present their supersedeas bond on said writ of error in the sum of fifteen thousand ($15,000) dollars, with P. I. Bonebrake, of Topeka, Kan., and J. R. Mulvane, of Topeka, Kan., as sureties.

Upon consideration whereof the said bond and the sufficiency of the sureties thereon is hereby approved by me.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

Dated this 2 day of August, 1898.

(Endorsed:) 10381. In the supreme court of the State of Kansas. Chicago, Rock Island & Pacific R'y Company and S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* Lissa Martin, administratrix, defendant in error. Journal entry. Filed Aug. 2, 1898. Jno. Martin, clerk supreme court.

1067 And also, on the 2nd day of August, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error, which, with the allowance thereof endorsed thereon, is in words and figures as follows, to wit:

1068 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court of the State of Kansas, before you or some of you, being the highest court of law or equity of said State in which a decision could be had, in a suit between The Chicago, Rock Island & Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs in error, and Lissa Martin, as administratrix of the estate of William Martin, deceased, defendant in error, wherein there was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein there was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein there was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Chicago, Rock Island & Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, as by their complaint appears, we, being willing
1069 that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on a day not exceeding thirty days from the 2d day of August, 1898, in the office of the clerk of the said Supreme Court, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 2d day of August, in the year of our Lord eighteen hundred and ninety-eight.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed by—
FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

1070 [Endorsed:] 10381. In supreme court of State of Kansas. Chicago, R. I. & Pac. R'y Co. & S. H. H. Clark *et al.*, receivers U. P. R'y Co., *vs.* Lissa Martin, as adm'x. Writ of error. Filed Aug. 2, 1898. Jno. Martin, clerk supreme court.

1071 A true and certified copy of the foregoing writ of error was lodged in the office of the clerk of the supreme court of Kansas by plaintiffs in error, for defendant in error, upon the 4th day of August, 1898, and the following endorsement made thereon:

1072 10381. Copy of writ of error lodged with clerk supreme court by plaintiffs in error for defendant in error. C., R. I. & P. R'y Co. and S. H. H. Clark *et al.*, etc., plaintiffs in error, *vs.* Lissa Martin, defendant in error. Filed Aug. 4, 1898. Jno. Martin, clerk supreme court. For Lissa Martin, defendant in error.

1073 And also on the 2nd day of August, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a supersedeas bond, which, with the approval thereof endorsed thereon, is in words and figures as follows, to wit:

1074 Know all men by these presents that we, P. I. Bonebrake and J. R. Mulvane, of Topeka, Shawnee county, Kansas, are held and firmly bound unto Lissa Martin, as administratrix of the estate of William Martin, deceased, in the full sum of fifteen thousand ($15,000) dollars, to be paid to the said Lissa Martin, as administratrix of the estate of William Martin, deceased; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Whereas, upon or about the 11th day of June, A. D. 1898, in a suit depending in the supreme court of the State of Kansas, between The Chicago, Rock Island & Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs in error, and Lissa Martin, as administratrix of the estate of William Martin, deceased, defendant in error, judgment was rendered against said plaintiffs in error, and the said plaintiffs in error have obtained a writ of error in the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant in error, citing and admonishing her to be and appear in the Supreme Court of the United States, at the city of Washington, within thirty days from and after the 2d of August, 1898:

Now, the condition of the above obligation is such that if the said The Chicago, Rock Island & Pacific Railway Company and the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and effect.

Sealed with our hands and dated this 2d day of August, 1898.

P. I. BONEBRAKE.
J. R. MULVANE.

Approved by—
FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

1075 (Endorsed:) 10381. In the supreme court of the State of Kansas. Chicago, R. I. & Pac. R'Ty Co. and S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* Lissa Martin, adm'x, defendant in error. Supersedeas bond. Filed Aug. 2, 1898. John Martin, clerk supreme court.

1076 And afterwards, on the 4th day of August, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation, which, with the acknowledgement of service endorsed thereon and proof of service attached thereto, is in words and figures as follows, to wit:

1077 UNITED STATES OF AMERICA, *ss.*:

To Lissa Martin, as administratrix of the estate of William Martin, deceased, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the city of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein you are defendants in error and The Chicago, Rock Island and Pa-

cific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, are plaintiffs in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas, this 2d day of August, A. D. 1898.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

Service of the foregoing citation hereby acknowledged upon this 3 day of August, 1898.

F. B. DAWES,
Attorney for Lissa Martin, as Administratrix, &c.

1078 [Endorsed:] 10381. In the supreme court of the State of Kansas. The Chicago, R. I. & Pac. R'y Co. and S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* Lissa Martin, adm'x, defendants in error. Citation. Filed Aug. 4, 1898. Jno. Martin, clerk supreme court.

1079 In the Supreme Court of the State of Kansas.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs in Error, *vs* LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Defendant in Error.	No. 10381.

I, John Martin, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, true, and complete transcript of pleadings and papers filed and of all proceedings had in the above-entitled cause, as the same remains now on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas, hereto affixed, at my office, in the city of Topeka, this 22d day of August, A. D. 1898.

JNO. MARTIN,
Clerk Supreme Court.

1080 In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs in Error,

vs.

LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Defendant in Error.

} Stipulation.

Whereas the only errors relied upon by the above-named plaintiffs in error are those set forth in their assignment of errors, filed in the supreme court of the State of Kansas and made a part of the record in this cause, copy of which assignment of errors is hereto attached and made a part hereof: and

Whereas it is agreed between the parties hereto that it is only necessary to print such portions of the record as are hereinafter designated for the purpose of presenting the errors therein specified to this court:

It is therefore agreed by and between the parties hereto that only the following portions of said record need be printed, to wit:

1. All of the pleadings, with accompanying recitals and endorsements.

2. The petition and bond for removal, with accompanying recitals and endorsements.

3. The order of the trial court refusing to remove the case, with the preceding recital in reference thereto.

4. The objections made to the introduction of testimony and the rulings of the court thereon, together with the proceedings of the court prior thereto, which read as follows, to wit:

1081 "FRIDAY, *June 21st*, 1894.

"And thereupon the plaintiff, to maintain the issues on her part, offered the following evidence:

"E. C. DUPLESSIS, being called on the part of plaintiff and sworn, testifies as follows, to wit:

"Direct examination by Mr. DAWES:

"Q. What is your name?"

5. The verdict of the jury.

6. The motions for a new trial and the rulings of the court thereon.

7. The final judgment of the trial court.

7*a*. The petitions in error, filed in the State supreme court.

8. The order of the State supreme court consolidating the two appeals, to wit, the appeal of the receivers of the Union Pacific Railway Company and the appeal of the Chicago, Rock Island & Pacific Railway Company.

9. The syllabus and opinion of the supreme court.

10. The final judgment of the supreme court.

11. The writ of error, citation, assignment of errors, and all other papers filed or orders made in connection with the appeal of the case from the supreme court of the State to the Supreme Court of the United States.

12. The within stipulation.

M. A. LOW,
W. F. EVANS,
Attorneys for The Chicago, Rock Island & Pacific R'y Co., Plaintiffs in Error.
A. L. WILLIAMS,
Attorneys for S. H. H. Clark et al., Receivers U. P. R'y Co., Plaintiffs in Error.
T. F. GARVER,
F. B. DAWES,
Attorneys for Lissa Martin, Adm'x, Defendant in Error.

1082

Copy.

In the Supreme Court of the State of Kansas.

THE CHICAGO, ROCK ISLAND & PACIFIC Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs in Error, *vs.* LISSA MARTIN, Administratrix of the Estate of William Martin, Deceased, Defendant in Error.	Assignment of Errors.

The Chicago, Rock Island & Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, plaintiffs in error herein, in connection with their petition for a writ of error, make the following assignment of errors, which they aver appear in the record in this cause, to wit:

First.

The said supreme court of the State of Kansas erred in affirming the judgment of the lower court.

Second.

The said supreme court of the State of Kansas erred in failing and refusing to reverse the judgment of the lower court.

Third.

The said supreme court of the State of Kansas erred in holding that the State court had jurisdiction of said cause after the receivers of the Union Pacific Railway Company had filed a proper petition

and bond for the removal thereof to the circuit court of the United States for the district of Kansas.

Fourth.

The said supreme court of the State of Kansas erred in holding that the receivers of the Union Pacific Railway Company, who were appointed by and acting under orders of a Federal
1083 court and in charge of property belonging to a Federal corporation, could not remove a case brought against said receivers and the Chicago, Rock Island & Pacific Railway Company to the Federal court, where the controversy was not a separable one, without being joined in the application for removal by their codefendant, the said Chicago, Rock Island & Pacific Railway Company.

Fifth.

The said supreme court of the State of Kansas erred in holding that in a case involving a Federal question, wherein the amount in controversy, exclusive of interest and costs, was more than the sum of two thousand dollars, a removal could not be had to the Federal court, where the controversy was not a separable one, unless all the parties defendant joined in the application for removal.

Sixth.

The said supreme court of the State of Kansas erred in holding and deciding that the State court had jurisdiction to try said cause.

Seventh.

The said supreme court of the State of Kansas erred in holding and deciding that the petition and bond of the receivers of the Union Pacific Railway Company for the removal of said action to the United States circuit court did not deprive the State court of jurisdiction to try said case.

(Signed) M. A. LOW &
W. F. EVANS,
A. L. WILLIAMS &
N. H. LOOMIS,
Attorneys for Plaintiffs in Error.

1084 [Endorsed:] File No., 16,986. Supreme Court U. S., October term, 1899. Term No., 135. The Chicago, Rock Island & Pac. Railway Co. *et al.*, P. E., *vs.* Lissa Martin, adm'x. Assignment of errors & stipulation as to parts of record to be printed. Filed Aug. 2, 1899.

Endorsed on cover: Case No. 16,986. Kansas supreme court. Term No., 135. The Chicago, Rock Island & Pacific Railway Company and S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* Lissa Martin, administratrix of the estate of William Martin, deceased. Filed September 13, 1898.

No. 135.

Brf. of Pierce, Williams, Kelly, Loomis & Low v Evans for P. E.

Office Supreme Court U. S.
FILED
NOV 27 1899
JAMES H. MCKENNEY,
Clerk.

Filed Nov. 27, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND S. H. H. CLARK *et al.*, RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, *Plaintiffs in Error*,

vs.

LISSA MARTIN, ADMINISTRATRIX OF THE ESTATE OF WILLIAM MARTIN, DECEASED, *Defendant in Error.*

No. 135.

BRIEF FOR PLAINTIFFS IN ERROR.

WINSLOW S. PIERCE, W. R. KELLY,
A. L. WILLIAMS, AND N. H. LOOMIS,
Attorneys for Plaintiffs in Error.

M. A. LOW and
W. F. EVANS,
Of Counsel.

CRANE & CO., TOPEKA.

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND S. H. H. CLARK *et al.*, RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, *Plaintiffs in Error*,

vs.

LISSA MARTIN, ADMINISTRATRIX OF THE ESTATE OF WILLIAM MARTIN, DECEASED, *Defendant in Error.*

No. 135.

BRIEF FOR PLAINTIFFS IN ERROR.

THIS suit was brought by Lissa Martin as administratrix of the estate of William Martin, deceased, against The Chicago, Rock Island & Pacific Railway Company and the Receivers of the Union Pacific Railway Company, in the District Court of Clay county, Kansas, to recover $10,000 damages for the death of the decedent.

The petition alleges in substance, (Record, p. 31,) that The Chicago, Rock Island & Pacific Railway Company had leased and was using the tracks of the Union Pacific Railway Company between Topeka, Kansas, and Kansas City, Missouri; that on the 2d day of January, 1894, William Martin was riding as a passenger on a train being

operated by the Receivers of the Union Pacific Railway Company between Topeka and Kansas City; that the rear end of the train occupied by him was run into by a train of The Chicago, Rock Island & Pacific Railway Company; that the death of said William Martin was caused by the gross and wanton negligence of the men in the employ of each and all of the defendants in operating both of said trains, and because of the want of ordinary care and skill in moving and operating both of said trains, at or near the town of Linwood, in the county of Leavenworth, State of Kansas. The petition also alleges the appointment of Lissa Martin as administratrix, the incorporation of The Chicago, Rock Island & Pacific Railway Company, and of the Union Pacific Railway Company. The petition also makes the following allegations in regard to the appointment of the Receivers of the Union Pacific Railway Company, (Record, p. 32):

"Plaintiff further avers that on the — day of ——, 1893, by order and decree of the Circuit Court of the United States in and for the District of Nebraska, the above-named defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane and Frederick R. Coudert, were duly appointed, according to law, Receivers of the Union Pacific Railway Company; that long prior to the 2d day of January, 1894, each of said defendants had qualified, as provided by law, as such Receivers, as aforesaid, and were long before said last-mentioned date in full possession of all the lines of road belonging to the said The Union Pacific Railway Company, including the aforementioned lines in the State of Kansas, and were, on the said second day of

January, 1894, operating said lines in Kansas, including the one running through the county of Clay, in said State, and also the line leading from Kansas City westward to and through the city of Topeka, as heretofore referred to as being under lease to and operated by the defendant, The Chicago, Rock Island & Pacific Railway Company."

Plaintiff's petition was filed January 26, 1894. On the 14th of February, 1894, The Chicago, Rock Island & Pacific Railway Company filed its separate answer. (See Record, p. 34.)

On the 20th of February, 1894, "and before the time had expired in which to answer or plead to said plaintiff's petition, the said defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as Receivers of the Union Pacific Railway Company, filed with the clerk of said court their petition and bond praying for the removal of said cause to the United States Circuit Court for the District of Kansas," which petition for removal, omitting the caption, signatures of counsel, and verification, reads as follows (Record, p. 34):

"*To said District Court:* Your petitioners, the above-named S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and Frederick R. Coudert, Receivers, defendants in the above-entitled cause, respectfully show to this honorable court that the matter and amount in dispute in said cause exceeds, exclusive of interest and costs, the sum or value of five thousand dollars.

"Your petitioners further allege that the said S. H. H. Clark, Oliver W. Mink and E. Ellery Anderson were, upon

the 13th of October, 1893, appointed Receivers of the Union Pacific Railway Company by the Circuit Court of the United States for the District of Nebraska; that they were appointed ancillary Receivers of said Union Pacific Railway Company by the Circuit Court of the United States for the District of Kansas upon the same day; that thereafter, upon, to wit, the 13th day of November, 1893, J. W. Doane and Frederick R. Coudert were appointed additional Receivers of said Union Pacific Railway Company by said United States Circuit Court for the District of Nebraska, and thereafter, to wit, upon the 27th day of November, 1893, said J. W. Doane and F. R. Coudert were appointed additional ancillary Receivers of said railway company by the United States Circuit Court for the District of Kansas.

"That immediately after their respective appointments as Receivers of said railway company they qualified as such Receivers and entered upon the discharge of their duties as such, and have been in the exclusive possession and control of the trains and other property of said Union Pacific Railway Company since their appointment as Receivers as aforesaid.

"Your petitioners further show to the court, that said Union Pacific Railway Company was at the time of the commencement of this suit and still is a corporation created by the consolidation of the Union Pacific Railroad Company, created and existing under an act of Congress entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved July 1, 1862; the Kansas Pacific Railway Company, mentioned in said act of Congress as the Leavenworth, Pawnee & Western Railroad Company, a corporation created under the laws of Kansas, organized and operating its railroads

in said State, and a citizen thereof, and the Denver Pacific Railway and Telegraph Company, a corporation created by virtue of the laws of Colorado, operating a road in that State, and a citizen thereof, such consolidation having been made by virtue of the authority contained in said act of Congress and amendments thereto and other acts of Congress authorizing the same; that said S. H. H. Clark is and was at the time of the commencement of this action a citizen of the State of Missouri; that said Oliver W. Mink is and was at the time of the commencement of this action a citizen of the State of Massachusetts; that said E. Ellery Anderson is and was at the time of the commencement of this action a citizen of the State of New York; that said J. W. Doane is and was at the time of the commencement of this action a citizen of the State of Illinois; that said F. R. Coudert is and was at the time of the commencement of this action a citizen of the State of New York; that the said plaintiff is and was at the time of the commencement of this action a citizen of the State of Kansas; that said Chicago, Rock Island & Pacific Railway Company is and was at the time of the commencement of this action a corporation organized and existing under the laws of the States of Illinois and Iowa, and a citizen of said States.

"Your petitioners further allege that the controversy in said suit is one between your petitioner and said Lissa Martin, administratrix, plaintiff, and that said suit is one arising under the laws of the United States.

"Your petitioners offer herewith a bond, with good and sufficient surety, for their entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

"And your petitioners pray this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States for the District of Kansas, first division; and they will ever pray."

On the 13th of March, 1894, the application of the Receivers of the Union Pacific Railway Company for the removal of said cause to the Circuit Court of the United States for the District of Kansas came on for hearing before the District Court of Clay county, Kansas, and was by that court overruled; the Receivers of the Union Pacific Railway Company duly excepting. The court specifically found that the bond which accompanied the petition for removal was good and sufficient. (See Record, p. 38.)

Thereupon the Receivers of the Union Pacific Railway Company filed their answer to plaintiff's petition and the case proceeded to trial. Among the other defenses set up in their answer was the following one (Record, p. 39):

"That this court has no jurisdiction of the matter in controversy in this suit, for the reason that these defendants at the proper time duly filed their petition and bond for the removal of this cause to the Circuit Court of the United States, District of Kansas."

The defendants, Receivers of the Union Pacific Railway Company, and The Chicago, Rock Island & Pacific Railway Company, also objected to the introduction of any testimony in the case, because the court had no jurisdiction of it, on the ground that the Receivers of the Union Pacific

had filed their petition and bond for the removal of the case to the Circuit Court of the United States, and had filed a transcript of the proceedings in the Federal court as required by law. (Record, p. 40.) This objection was by the court overruled, the defendants at the time duly excepting. (Record, p. 40.)

The jury returned a verdict in favor of the plaintiff and against all the defendants for $10,000. Motions for a new trial were filed by all the defendants, setting forth, among other things, that the court had erred in refusing to sustain the application of the Receivers of the Union Pacific Railway Company for the removal of said case to the Circuit Court of the United States for the District of Kansas, and because the court had lost jurisdiction thereof upon the filing of the petition and bond for removal. (See Record, pp. 42, 44.)

These motions were overruled, the defendants excepting thereto, and judgment entered in favor of the plaintiff and against all the defendants for the sum of $10,000 and costs. (Record, p. 45.) The case was taken on error to the Supreme Court of the State of Kansas, by The Chicago, Rock Island & Pacific Railway Company and the Receivers of the Union Pacific Railway Company. By order of that court, made as of May 3, 1898, the two appeals were consolidated under the title of The Chicago, Rock Island & Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R.

Coudert, as Receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* Lissa Martin, administratrix of the estate of William Martin, deceased, defendant in error. (See Record, p. 54.)

Among the errors complained of in the petition in error filed by The Chicago, Rock Island & Pacific Railway Company in the Supreme Court of Kansas was the following (Record, p. 5):

"12. That the court erred in overruling the petition and application of the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as Receivers of the Union Pacific Railway Company for the removal of said cause to the United States Circuit Court, and erred in refusing to remove said cause to said Circuit Court, as shown on page 16 of said case-made."

Among the errors complained of by the Receivers of the Union Pacific Railway Company in the petition in error filed in the Supreme Court of Kansas, were the following (Record, p. 2):

"15th. Because the court lost jurisdiction of said cause upon the filing by said Receivers of their petition and bond for the removal of said cause to the United States Circuit Court for the District of Kansas, and thereafter said court had no power to proceed with the trial of said cause.

"16th. Because the court erred in refusing to sustain the application of said Receivers for the removal of said cause to the United States Circuit Court for the District of Kansas."

The Supreme Court of Kansas affirmed the judgment of the lower court. (Record, p. 46.) Among the errors assigned by the plaintiffs in error and passed upon by the State Supreme Court were those arising from the refusal of the State court to remove the case to the Federal court upon the application of the Receivers of the Union Pacific Railway Company.

Upon those questions the court held that the Receivers of the Union Pacific Railway Company could not remove the case unless their co-defendant, The Chicago, Rock Island & Pacific Railway Company, joined with them in making the necessary application. The opinion of the court upon this subject reads as follows (Record, p. 52):

"On behalf of the Receivers, the first contention is that a petition and bond for a removal of the cause to the Circuit Court of the United States for the District of Kansas was duly filed and the bond approved, but the court refused to order the removal, and that the court thereby lost jurisdiction, and thereafter had no power to proceed. The answer of the Rock Island Company was filed on the 14th of February. The petition and bond of the Receivers for removal were filed on the 20th of the same month. The Rock Island Company did not join in the application for removal, but it is now insisted by this company, as well as by the Receivers, that the District Court lost jurisdiction by the filing of the petition and bond. It is said that the Union Pacific Railway Company has a right to remove causes from the State to the Federal courts by reason of a Federal court question being involved; that its Receivers have a right to remove because of their appointment by the Federal court. It is con-

tended that conceding the right of the plaintiff to sue both defendants jointly, the Receivers have a right to remove without being joined in the petition by the Rock Island Company, because the removal is based on the ground that a Federal question is involved. It is conceded that if a right of removal had been claimed solely on the ground of citizenship, it would have been necessary for all the defendants to join, but being based on the proposition that a Federal question was involved, it is claimed that such joinder was unnecessary. In support of this claim, the following cases are cited: *Ames v. Union Pacific,* 111 U. S. 449; *Pacific Removal Cases,* 115 U. S. 1; *Mitchell v. Smale,* 140 U. S. 406; *Ry. Co. v. Cox,* 145 U. S. 593; *Texas & Pacific Ry. Co. v. Cody,* 116 U. S. 606, and 17 Supreme Court Reporter, 703; *Evans v. Dillingham,* 43 Federal, 177; *Seattle &c. Ry. Co. v. State,* 52 Federal, 596; *Trust Co. v. Ry. Co.,* 59 Federal, 523; *Southern Pac. Ry. Co. v. Townsend,* 62 Federal, 161; *Landers v. Felton,* 73 Federal, 311; *Lund v. The C. R. I. & P. Ry. Co.,* 78 Federal, 385. The only ones of the cases cited that seem to us to support this contention are those from the 52 and 78 Federal Reporter. Our own construction of the Federal statute on the subject (section 2, page 612, Supplement to the Revised Statutes of the United States) is, that it was necessary for both defendants to join in the petition for a removal. They were charged with jointly causing the death of the plaintiff's intestate. The controversy was not separable, and the Receivers alone had no right to removal on the ground that a Federal question was involved. No Federal question was in fact presented by the pleadings nor litigated at the trial. It was the ordinary action under our statute for wrongfully causing the death of the plaintiff's intestate. In the view that both defendants must join in the petition for removal, we are supported by able Federal judges in the cases of *Thompson v. C. St. P. & K. C. Ry.*

Co., 60 Federal, 773; *Shearing v. Trumbull*, 73 Federal, 33; and by *Texas & Pacific Ry. Co. v. Young*, 27 S. W. 145; Black's Dillon on Removal of Causes, section 77."

The statutes of Kansas make the opinion of the Supreme Court a part of the record in the case. See section 21, page 23, vol. 2, General Statutes of Kansas for 1897. This statute reads as follows:

"21. It shall be the duty of the judges of the Supreme Court to prepare and file with the papers in each case full notes of the opinion of the court upon the questions of law arising in the case, within sixty days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor except for copies thereof ordered by a party; and no mandate shall be sent to the court below until the opinion provided for by this section has been filed."

After the judgment of affirmance was rendered by the Supreme Court of the State of Kansas, the plaintiffs in error united in taking the case by writ of error to this court. The only questions presented to this court for consideration are those growing out of the application of the Receivers of the Union Pacific Railway Company to remove the case from the State to the Federal court. They are more specifically set forth in our assignment of errors, which we here adopt as our errors assigned:

ERRORS ASSIGNED.

FIRST.

The said Supreme Court of the State of Kansas erred in affirming the judgment of the lower court.

SECOND.

The said Supreme Court of the State of Kansas erred in failing and refusing to reverse the judgment of the lower court.

THIRD.

The said Supreme Court of the State of Kansas erred in holding that the State court had jurisdiction of said cause after the Receivers of the Union Pacific Railway Company had filed a proper petition and bond for the removal thereof to the Circuit Court of the United States for the district of Kansas.

FOURTH.

The said Supreme Court of the State of Kansas erred in holding that the Receivers of the Union Pacific Railway Company, who were appointed by and acting under orders of a Federal court and in charge of property belonging to a Federal corporation, could not remove a case brought against said Receivers and The Chicago, Rock Island and Pacific Railway Company to the Federal court, where the controversy was not a separable one, without being joined in the application for removal by their co-defendant, the said The Chicago, Rock Island & Pacific Railway Company.

FIFTH.

The said Supreme Court of the State of Kansas erred in holding that in a case involving a Federal question wherein the amount in controversy, exclusive of interest and costs, was more than the sum of two thousand dollars, a removal

could not be had to the Federal court, where the controversy was not a separable one, unless all the parties defendant joined in the application for removal.

SIXTH.

The said Supreme Court of the State of Kansas erred in holding and deciding that the State court had jurisdiction to try said cause.

SEVENTH.

The said Supreme Court of the State of Kansas erred in holding and deciding that the petition and bond of the Receivers of the Union Pacific Railway Company for the removal of said action to the United States Circuit Court did not deprive the State court of jurisdiction to try said case.

ARGUMENT.

I.

THIS IS A CASE ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

At the time the application to remove was made by the Receivers of the Union Pacific Railway Company, it appeared from the record that they were appointed Receivers by a Federal court; it also appeared from the record that the Union Pacific Railway Company was a Federal corporation. These facts being true, it follows conclusively from the decisions of this court that a Federal question was involved.

Pacific Removal Cases, 115 U. S. 1.
Ames v. Union Pacific, 111 U. S. 449.
Tex. & Pac. Ry. Co. v. Cody, 166 U. S. 606.
Tex. & Pac. Ry. Co. v. Cox, 145 U. S. 593.

II.

AS THE REMOVAL WAS SOUGHT ON THE GROUND THAT THE CASE WAS ONE ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES, THE REQUIREMENTS OF THE LAW WERE SATISFIED BY HAVING THE APPLICATION MADE BY THE PARTIES ENTITLED TO RAISE THE FEDERAL QUESTIONS INVOLVED, WITHOUT JOINING THEIR CO-DEFENDANT.

The Supreme Court of Kansas held that the Receivers of the Union Pacific Railway Company were not entitled to remove the case to the Federal court, because of the fail-

ure of their co-defendant, The Chicago, Rock Island and Pacific Railway Company, to join in the application. Our contention is, that where the removal is sought upon the ground that a Federal question is involved, it is not necessary for all of the defendants to petition for the removal; that it is sufficient if all of the defendants who are entitled to raise the Federal question, join in the application.

The Receivers of the Union Pacific Railway Company were the only parties defendant who could remove the case on the ground that it was one arising under the Constitution and laws of the United States; and as they applied for the removal, the State court lost jurisdiction of the case, notwithstanding the fact that The Chicago, Rock Island & Pacific Railway Company filed its answer there.

In order to obtain a more thorough understanding of the question involved, it may be proper to extend our investigation as far back as the Judiciary Act of 1789. By the terms of that act the Circuit Courts of the United States had jurisdiction of all suits of a civil nature at common law, or in equity: (1) Where the United States were plaintiffs or petitioners; (2) where an alien was a party; (3) where the suit was between a citizen of the State where the suit was brought, and a citizen of another State. The removal of cases was provided for in the following instances: (1) Where the suit was commenced against an alien; (2) where the suit was by a citizen of the State in

which the suit was brought, against a citizen of another State; (3) in cases involving the title of lands based upon grants from other States when adverse party claimed under grant from the State where suit was pending.

It will thus be seen that the Judiciary Act made no provision for original jurisdiction in the Circuit Courts of the United States, of cases arising under the Constitution and laws of the United States, nor for the removal of cases from State to Federal courts based upon that ground. Congress seemed satisfied at that time to permit cases involving Federal questions to be first litigated in the State courts, leaving the final determination of the Federal questions involved to be passed upon by the Supreme Court of the United States. The only cases of a civil nature of which the Circuit Courts of the United States were given original jurisdiction outside of those in which the United States were plaintiffs, were those growing out of the diverse citizenship of the parties, or alienage. And such were substantially the only cases which could be removed.

The act of 1789 may be characterized as a statute where the right to remove a case from a State court into a court of the United States was made to depend upon citizenship or alienage.

It was very early held by the courts, that in order to justify a removal under the act of 1789, all of the plaintiffs must be citizens of the State in which the suit was brought, and that all of the defendants must be citizens

of States other than the one in which the suit was brought. It was furthermore held under this act, that in order to effect a removal, all of the defendants must join in the application. These decisions have been followed by the courts under the different statutes which have been passed providing for the removal of cases from State to Federal courts *on the ground of diverse citizenship*. The recent decisions upon this point refer back to, and are based upon, the decisions made under the original Judiciary Act of 1789.

On March 2, 1833, Congress passed an act authorizing the removal of certain cases arising under the Constitution or laws of the United States. This was the first instance in which Congress conferred jurisdiction upon United States Circuit Courts in civil cases based upon this ground.

This act provides for the removal of cases commenced in the State courts against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority or title set up or claimed by such officer or other person under any such law of the United States.

The act declares that in such cases it shall be lawful for the *defendant* to remove the case to the Circuit Court of the United States. Under this act authorizing the *defendant* to remove the case, it has been held that the re-

moval may be had if it be applied for by the defendant who raises the Federal question, without his co-defendants joining in the application. In other words, it has been decided by the courts that under this statute it was not necessary for all the defendants to join in order to effect a removal. It will be observed that this is contrary to the practice where the case is removed by reason of the citizenship of the parties. Under the Judiciary Act of 1789 "the defendant" was permitted to remove the case, and that was held to mean *all* the defendants. Under the act of 1833 "the defendant" was given the right to remove the case, and that was construed to mean, not all the defendants, but only those who were affected by the Federal question involved.

On March 3, 1863, another act was adopted under this clause of the Constitution, authorizing the removal of cases for acts done during the war of the Rebellion under authority of the President of the United States or any act of Congress. By the terms of that act "the defendant" was given the right to remove the case, and this was construed to mean the defendant affected by the Federal question.

The same principles are applicable to the act of April 9, 1866, authorizing the removal of cases involving the civil rights of citizens of the United States, where the removal is made upon the application of "the defendant."

On July 27, 1868, Congress passed another act author-

izing the removal of certain other cases arising under the Constitution or laws of the United States. That act provided for the removal of suits against Federal corporations or their members. Under its provisions Federal corporations or their members might remove cases without their co-defendants uniting with them in the application.

The various questions arising upon the removal of cases, based upon the fact that they arose under the Constitution or laws of the United States, were exhaustively considered by Judge BLATCHFORD, afterwards Associate Justice of this court, in the case of *Fisk v. Union Pacific Railroad Company*, reported in 6 Blatchford, 362. That was a case originally instituted in the Supreme Court of New York by James Fisk, Jr., against the Union Pacific Railroad Company, a corporation organized under the laws of the United States, and twenty-three other defendants. It was removed to the United States Circuit Court for the Southern District of New York. The jurisdiction of the Federal Court was assailed upon the ground, among others, that the petition for removal was not joined in by all the defendants. The court held that it was not necessary for all the defendants to join in the application to remove, and held jurisdiction of the case. In the course of the opinion Judge BLATCHFORD said (p. 373):

"It is quite apparent that the jurisdiction which Congress intended to give, under this act of 1833, where a suit or prosecution is commenced against any officer of the

United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer, or other person, under any such law of the United States, is to be such a jurisdiction that a plaintiff in a State court shall not be able to deprive such officer or other person, who is sued on account of an act done under the revenue laws, of the right to remove the suit into a court of the United States, under this statute, *by joining with him in the same suit other defendants who are not sued on account of acts done under the revenue laws.* Thus to deprive the Federal court of jurisdiction of the case, would be to deprive the officer or person justifying under the revenue laws, of the power to have his rights adjudicated from the commencement by the Federal court, and to compel him to follow the case through the State courts in all of its stages, and finally take it, under the 25th section of the Judiciary Act, to the Supreme Court of the United States. No such construction of this law has been admitted, so far as I am aware. The manifest intent of this statute, in saying that 'it shall be the duty of the said State court to stay all further proceedings in such cause, and the said suit, or prosecution, upon delivery of such process, or leaving the same, as aforesaid, shall be deemed and taken to be moved into the said Circuit Court, and any further proceedings, trial, or judgment therein in the State court, shall be wholly null and void,' is to remove *the suit.* The suit goes into the Federal court, with all the parties to the suit. Every party to the suit is brought into the Federal court when the suit is brought there, and the court, in obtaining jurisdiction of the suit, obtains jurisdiction over all the parties to it. It is plain that this must be the construction of the act of 1833, or it would be mere waste paper. Otherwise, a plaintiff would have it in his power to deprive an

officer of the United States, who justified his acts under the revenue laws, from ever removing the cause into the Federal court, by joining with such officer, as a defendant, some other person, or other causes of action, no matter how incongruous or irrelevant."

The court then declares that the same principles apply to the act of March 3, 1863, which provides for the removal of suits brought against officers or other persons for arrests made or wrongs done during the war of the Rebellion, by virtue of or under color of any authority derived from, or exercised under the President of the United States, or any act of Congress. That act provides that *the defendant* may petition for the removal of the cause, etc. After reciting the provisions of the act the court goes on to say (p. 375):

"This act thus provides for removing the whole suit, no matter who the parties are, and no matter what relief is sought to be obtained in the suit, provided there is found in the suit, as an ingredient therein, a claim against an officer, or any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the Rebellion, under color of any authority derived from, or exercised by, or under, the President of the United States, or any act of Congress. If such ingredient is found in the suit, the whole suit goes into the Federal court. If this were not so, then, as in the case of the act of 1833, a plaintiff could deprive a party of all remedy under this statute."

This point was also fully considered by Mr. Justice Nelson, and passed upon by him on a motion to remand,

in the same case of *Fisk v. Union Pacific Railroad Company*, 8 Blatchford, 243. In that case it was held "that the joining of defendants in a suit, not within the limitation as prescribed by the act, with those who are, cannot be permitted to withdraw a cause from the jurisdiction of the Federal courts."

After stating this proposition of law, Mr. Justice NELSON proceeds to give the following reasons therefor (p. 248):

"If this were admitted, the privilege extended to the parties setting up a right under the Constitution and laws of the United States, would, in most, if not in every instance, be defeated. Indeed, if any such principle could be admitted, most of these acts of removal, depending principally upon the subject-matter, and intended to secure the interpretation of the Constitution and laws of the United States, at the original hearing, to its own judiciary, would be futile and worthless.

"The act of 1833, which provides for the removal of suits against an officer of the United States, or other person, for acts done under the revenue laws, could be readily evaded, by joining one or more persons with him not acting in that capacity. If these outside parties are deemed material, or are really material, to a complete remedy in behalf of the plaintiff, they must be regarded as subordinate and incidental to the principal litigation in respect to which the act of Congress has interposed the remedy of removal. In this way, the right of the parties to have their defense under the Constitution or laws of the United States, tried in the Federal courts, is secured, and, at the same time, the remedy of the plaintiff is unimpaired."

On March 3, 1875, Congress conferred jurisdiction upon the Circuit Courts of the United States in *all* suits of a civil nature arising under the Constitution or laws of the United States, where the matter in dispute exceeded, exclusive of costs, the sum of five hundred dollars. Removals were also authorized in such cases from the State to the Federal courts. The act of March 3, 1887, is similar in this respect to the act of March 3, 1875, except as to the amount involved.

The jurisdiction of the Federal courts under this clause of the Constitution was a matter of gradual growth, brought about by political and historical events which seemed to make the increase of Federal jurisdiction a National necessity.

The act of March 2, 1833, grew out of the Nullification troubles in South Carolina during the administration of President Jackson; the act of March 3, 1863, was made necessary by the war of the Rebellion; the act of April 9, 1866, was brought about by the emancipation of the slaves; and the act of July 27, 1868, resulted from the construction of the Pacific railroads.

It was the intention of Congress in passing these various acts to make it possible for the National Government, through its judicial tribunals, to more promptly assert its constitutional powers, and to make it impossible for State courts or officials to embarrass or obstruct the administration of Federal laws.

These acts permitted litigants to present controversies involving certain Federal questions, to Federal courts, to be determined there in the first instance, without going to the trouble, expense and delay of litigating them in hostile tribunals before reaching the courts specially charged with the duty of deciding such controversies.

The object which Congress had in view in the passage of these various laws would have been in a large measure defeated if they had been construed by the courts to mean that a removal could not be had under them unless *all* the defendants joined in the application for the removal. It would have been remarkable, if in its efforts to place controversies involving Federal questions beyond the power of adverse State interests and influences, Congress had made it possible for opposing parties to thwart its will by uniting with the defendant affected by the Federal question, other defendants not so affected, and whose desire would be to remain in the State court.

The proposition that a person having a defense arising under the Constitution or laws of the United States cannot be deprived of his right to maintain his defense in the Federal courts by joining other defendants not affected by the Federal question, is well enforced by the decision of this court in the case of *Sonnenthiel v. Christian Moreleín Brewing Co.*, 172 U. S. 401. In that case it was moved to dismiss upon the ground that the jurisdiction of the court depended upon the citizenship of the parties, and

therefore the decision of the Circuit Court of Appeals was final. This court held that as one of the defendants was a United States Marshal, the court had jurisdiction of the case as one arising under the Constitution and laws of the United States. This court also held that the joinder of another defendant, jurisdiction over whom was dependent upon diversity of citizenship, deprived the Marshal of no right he otherwise would have possessed. We quote from the opinion, which was written by Mr. Justice Brown (p. 405):

"The joinder of another defendant, jurisdiction over whom was dependent upon diversity of citizenship, deprived the marshal of no right he otherwise would have possessed. Though there are two defendants, the case was *one*, and that a case in which the jurisdiction was not dependent *entirely* upon the opposite parties to the suit being citizens of different States. Had two suits been brought, one of them would undoubtedly have been dependent upon citizenship, and the other a case arising under the laws of the United States. But as the plaintiff chose to join both defendants in a single action, jurisdiction of that action was not *wholly* dependent upon either consideration. Had the jurisdiction of the Circuit Court been originally invoked solely upon the ground of diversity of citizenship as applied to the Brewing Company, the case would have fallen within the *Colorado Central Mining Company v. Turck*, 150 U. S. 138, but as the original petition declared against Dickerson as marshal, for an official act as such, that case has no application."

When, in 1875, Congress still further enlarged the jurisdiction of Federal courts in civil cases arising under

the Constitution or laws of the United States by giving them jurisdiction in *all* such cases when the amount in dispute was sufficient, the principles governing the removal of such cases remained the same as they were when the jurisdiction was limited to certain specified classes of cases arising under the Constitution or laws of the United States. *In other words, the law simply enlarged the class of cases which might be removed, without changing the principles applicable to such removals.*

If under the acts of 1833, 1863, 1866, and 1868, authorizing the removal of certain cases arising under the Constitution or laws of the United States, a defendant affected by the Federal question involved could remove the cause without his co-defendant joining in the application for removal, then it follows that the same thing may be done under the acts of 1875 and of 1887. The decisions of the Federal courts have been almost uniform in holding that one of several defendants could, under the acts of 1875 and 1887, remove a case arising under the Constitution or laws of the United States. We give herewith a list of the cases bearing upon this point:

A case directly in point, and which should settle the question at issue, is that of *Mitchell v. Smale*, 140 U. S. 406. In that case plaintiff, a citizen of Illinois, sued in ejectment to recover possession of lands in that State claimed to have been granted to plaintiff's ancestors by a patent of the United States; making Jabez G. Smale, ten-

ant, and John I. and Frank I. Bennett, alleged to be the landlords, defendants. The Bennetts made special appearance, and moved that Conrad N. Jordan be substituted in their stead as defendant, on the ground that they had conveyed the property to Jordan before the commencement of the suit, and no longer had any interest in it. The motion was overruled, and thereupon Jordan was admitted to defend the cause as landlord and as co-defendant. Jordan thereupon petitioned for a removal of the cause under the act of 1875, on account of the diverse citizenship of the parties, claiming that the sole controversy in the case was between himself, a citizen of New York, and the plaintiff, a citizen of Illinois. Objections to the removal being made, Jordan amended his petition for removal by alleging that the title in controversy was based upon patents issued by the United States, and that therefore the case was one arising under the Constitution and laws of the United States. The court discusses the question as to whether the sole controversy in the cause was between Jordan and the plaintiff, and while it seems conceded that Smale was not a necessary party, yet it was held that the plaintiff had a perfect right to insist upon prosecuting his action against the Bennetts as well as against Jordan, so that there might be no failure of a complete recovery in the event of the plaintiff being made successful. The court states that on account of the Bennetts "there may have been great diffi-

culty in sustaining a removal," and then proceeds to hold as follows (p. 410):

"But be this as it may, we think that the additional ground of removal, stated in the amended petition, was sufficient to authorize the removal to be made. It states very clearly that the controversy between the parties involved the authority of the Land Department of the United States to grant the patent or patents under which the defendant claimed the right to hold the land in dispute after and in view of the patent under which the plaintiff claimed the same land. This, if true, certainly exhibited a claim by one party under the authority of the Government of the United States, which was contested by the other party on the ground of a want of such authority. In the settlement of this controversy, it is true, the laws of the State of Illinois might be invoked by one party or both; but it would still be no less true that the authority of the United States to make the grant relied on would necessarily be called in question. We are, therefore, of opinion that the ground of removal now referred to presented a case arising under the laws of the United States, and so within the purview of the act of 1875. The amendment was properly allowed, and no valid objection exists in regard to the time of the application."

It will thus be seen that the court sustained the removal although but one of the defendants petitioned for it, on the ground that the case was one arising under the Constitution or laws of the United States. It cannot be claimed that the court's attention was not called to the fact that but one of the defendants applied for the removal, because one of the questions in the case, which was discussed at considerable length, was, whether the case could be re-

moved by one of the defendants on the ground of a diversity of citizenship. Furthermore, it is a well-established rule of this court, that it does not wait for jurisdictional questions to be raised by the parties. The court raises them itself, and it cannot be supposed that this court failed to note the fact that only one of the several defendants petitioned for the removal.

This question was passed upon by Judge Ross in the case of *Southern Pacific R. Co. v. Townsend,* 62 Federal Reporter, 161. The syllabus in that case reads as follows:

"A suit to enforce a contract for sale of land, brought by the vendor, claiming title under a grant by act of Congress, against the purchaser and another to whom he had conveyed, who contests complainant's claim under such act, presents a case arising under the laws of the United States, which is removable on petition of such defendant alone, although the purchaser, not joining in the petition, is not a merely nominal party, and complainant is entitled to proceed to judgment against him."

The point at issue is thus stated in the opinion, page 165:

"The petition shows that the controversy respecting that matter necessarily involves the consideration of the act of Congress of March 3, 1871, exhibiting as it does a claim under that act on the part of the complainant, which is contested by the removing defendant. It therefore presents a case arising under the laws of the United States, and so removable to this court, unless the fact that there is another defendant who did not join in the petition defeats the removal. But that a single defendant may in such a case bring it to the Federal court, seems to

have been decided by the Supreme Court in the case of *Mitchell v. Smale,* 140 U. S. 406."

The court then summarizes the facts in the Smale case, and quotes from the opinion of the court. It then proceeds as follows:

"The manifest view of the court was that the Bennetts were proper parties as to whom the plaintiff had the right to proceed to judgment. They did not join in the petition for removal, yet the court held that the additional ground of removal stated in the amended petition was sufficient to authorize the removal to be made. . . . The decision of the Supreme Court in the case of *Mitchell v. Smale* is applicable to the removal in question, and upon the authority of that case, the motion to remand is denied."

To the same effect is the decision of Judge TAFT in the case of *Landers v. Felton,* 73 Fed. Rep. 311. In that case a petition for removal was filed by S. M. Felton, the receiver of a railroad company appointed by a Federal court. There were other defendants, who did not join in the application for the removal. The court held that the removal was properly made. The opinion of the court upon the point involved reads as follows (p. 314):

"The question here arises whether an action brought against the receiver of a United States court, and others, who are citizens of the same State as that of the plaintiff, to establish a joint liability of all the defendants, is a suit arising under the laws and Constitution of the United States. I do not see how it can be otherwise. No separate liability could be asserted against the receiver, as

receiver, except under the laws of the United States. If no separate liability could be asserted against him, except by virtue of those laws, certainly no joint liability with another can be asserted against him, except by virtue of the same laws. Therefore the joint liability of the defendants with the receiver arises under the laws and Constitution of the United States. If the plaintiff wished to sue the other defendants without joining the receiver, he had his election to do so, because the liability of joint tort feasors is also several. He might, therefore, have maintained his action against the resident defendants in a State court, without any possibility of removal to a Federal court. He elected, however, to join the resident defendants with a person against whom he could establish no liability, in the capacity in which he sues him, except by virtue of the laws of the United States. Therefore the joint cause of action which he asserts against all the defendants must find its sanction in the Federal statutes. Hence the cause of action is removable. The State court was in error in denying the petition of the receiver, and the motion to remand is overruled."

A case of similar import is that of *Lund v. C. R. I. & P. Ry. Co., et al.*, 78 Fed. Rep. 385. That was a joint action against the Rock Island Company and the Receivers of the Union Pacific Railway Company, to recover damages for personal injuries. The application for removal was made by the Receivers of the Union Pacific Railway Company upon the ground that the case was one arising under the Constitution and laws of the United States. The court sustained the removal.

Judge HANFORD considers this question in the case of *Seattle & M. Ry. Co. v. State, et al.*, 52 Fed. Rep. 594.

In remanding a case which was sought to be removed on the ground of a Federal question being involved, the court used this language (p. 596):

"I have considered the point made by the counsel for the plaintiff, that all the defendants did not join in petitioning for the removal of the cause to this court, but I am unwilling to rest my decision granting the motion to remand on that ground. The decisions of the Supreme Court, which were cited upon the argument, do not support counsel in the position taken. A case not cited by counsel on either side is to the contrary: *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. Rep. 819, 840. True, the opinion does not in words declare that a case arising under the laws of the United States can be removed from a State court to a United States Circuit Court, by the petition of only one of several defendants, but the case was such a case; it was removed upon such a petition; the questions as to the sufficiency of the petition and the jurisdiction of the Circuit Court were contested and were squarely met and decided by the Supreme Court, and the effect of the decision is to affirm the right of one of several defendants to remove a cause, if it be a case at law or in equity, arising under the Constitution or laws of the United States, and cognizable in a Circuit Court."

Respectfully submitted.

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Of Counsel.

Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND S. H. H. CLARK *et al.*, RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY,

Plaintiffs in Error.

vs.

LISSA MARTIN, ADMINISTRATRIX OF THE ESTATE OF WILLIAM MARTIN, DECEASED,

Defendant in Error.

No. 135.

BRIEF OF DEFENDANT IN ERROR.

ARGUMENT.

There are but two questions in this case—questions of jurisdiction. Upon the record was there a Federal question involved, and if so, could the receivers of the U. P. Ry. Co. remove the case without being joined in the application by the other defendant?

WAS THERE A FEDERAL QUESTION?

Did this suit arise under the Constitution or any law of the United States? In order to arrive at a satisfactory or intelligent conclusion it will be necessary to compare the present statute with those formerly in existence. Up to the passage of the act of 1875, the whole tendency of legislation was to increase and widen the jurisdiction of the Federal Courts. Since that time the efforts of legislation has been to curtail and narrow the jurisdiction of such Courts, and especially to diminish the grounds for removal of cases from the State Courts.

Section 2, of the law of 1875, among other things provided: "That any suit of a civil nature at law or in equity now pending or hereafter brought in any State Court, where the matter in dispute exceeds, exclusive of costs, the sum or value of Five Hundred Dollars, and arising under the Constitution and laws of the United States, *either party* may remove said suit into the Circuit Court of the United States for the proper district."

At the time the act of 1875 was passed there was upon the statutes a law which is now Section 640, Revised Statutes 1878, which provided that any corporation organized under the laws of the United States might remove any suit against it by filing an affidavit that its defense to the action arose under the Constitution or laws of the United States. While these two laws were in force it was decided that a railway corporation organized under a law of the United States, could remove suits against it from a State Court to a Federal Court.

The law of 1888 is entirely different from that of 1875. The law of 1888, instead of saying that "*either party*" might remove the suit, changed the wording so as to read, "*The defendant or defendants.*"

This took away the right of any one but the *defendant or defendants* to remove the suit. Section 6 of the law of 1888 also repealed Section 640 Revised Statutes of 1878, thus taking away the right of a Federal corporation to remove a suit by showing that its defense arose under the Constitution or laws of the United States.

Section 2, of the law of 1888, among other things provides, that when a receiver shall be in charge of property by virtue of any suit pending in a Federal Court, that such "*receiver shall operate such property* according to the requirements of the valid laws of the State in which such property shall be situated, etc."

Section 3 of the law of 1888 provides that a receiver appointed by a Federal Court in charge of property may be sued "*in respect of any act or transaction of his in carrying on the business connected with such property*, without the previous leave of the Court in which such receiver or manager was appointed."

It will thus be seen that it was the deliberate intention of Congress to take away largely the power to remove cases from State Courts on the ground that a Federal question was involved. Section 3 permitted Federal receivers to be sued in the State Courts, without leave, when the suit was connected with the operation of the property, because Section 2 had provided that *said receiver should not operate the property under Federal law, but should operate it under the valid laws of the State where such property should be situated.*

It necessarily follows that the property in the hands of the receiver, being operated under State law, any action arising from such operation would arise under State law, and not under Federal law.

Under the law as it is, what Federal question can there be in this case? What is a Federal question? When does a case arise under a law of the United States?

Chief Justice Marshall has said, that a case in law or equity "may truly be said to arise under the Constitution, or a law of the United States whenever its correct decisions depends on the construction of either."

Cohens vs. Virginia, 6 Wheat. 379.

"The suit must be one in which some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution, or a law or treaty of the United States, or sustained by a contrary construction."

Carson vs. Dunham, 121 U. S. 421.

Counsel for plaintiff in error cite the case of *Ames vs. K. P. Ry.*, 111 U. S. 449, as an authority in this case. That was a suit brought, the main purpose of which was to set aside the consolidation of the K. P. Ry. with the Union Pacific. The consolidation was effected under and by *virtue of a law of Congress*, and the result of the suit depended entirely upon the power of Congress to pass the law. It was a case where *one construction of the Constitution would uphold the suit and another would defeat it.* The Court based its decision upon this ground alone, and cite the old case of *Osborn vs. Bank* in support thereof.

The Court said:

"That the validity of the consolidation so far as the State is concerned, rests alone on the authority conferred for that purpose is not denied. If the acts of Congress confer the authority, the consolidation is valid; if not, it is invalid. Clearly, therefore, the cases arise under the acts of Congress, for, to use the language of the Chief Justice Marshall, an act of Congress 'is the first ingredient in the case, is its origin, is that from which every other part arises.' The right set up by the company and by the directors as well, will be defeated by *one* construction of these acts, and sustained by the *opposite* construction."

Ames vs. K. P. Ry., 111 U. S. 449.

In the case at bar, it would be an impossibility to drag in at any stage in any way a question which would require any sort of a construction of either the Constitution or a law of Congress.

The Pacific removal cases are cited as sustaining the contention of plaintiffs in error in this case. In that case the Court in its opinion, quotes copiously from the case of *Osborn vs. Bank*. There is *one* quotation we desire to call special attention to at this time. It is as follows:

"It is said that a clear distinction exists between the *party* and the *cause*; that the party may originate under a law with which the cause has no connection. * * * This distinction is not denied; and if the act of Congress was a simple act of incorporation and contained nothing more, *it might be entitled to great consideration*. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which the being possesses. Every act of the bank grows out of this law and is tested by it."

115 U. S. 1.

On the theory that the Union Pacific was *operated* under Federal law the Court found that the suit arose under a law of the United States. For special reasons which will hereinafter be stated, we call attention to the fact that the Chief Justice and Justice Miller dissented. In the dissenting opinion of the Chief Justice, we find the following language:

"The acts of incorporation made no provision for the removal to the Courts of the United States of suits begun in a State Court. The act of July 27, 1868, Ch. 255, Sec. 2, 15 Stat. at L. 227, now Sec. 640 of the Revised Statutes, did, however, give authority for that purpose in suits brought against the company in a State Court 'upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States.' If all suits by or against, and all defenses by, a federal corporation

necessarily arise under the laws of the United States 'because the charter of incorporation not only creates it, but gives it every faculty which it possesses,' why require the corporation, when asking for a removal, to cause an oath to be filed with its petition that it has a defense in the suit which arises under the Constitution or laws? If, 'because the power to acquire rights of any description, to sue on those contracts, is given and measured by its charter, and that charter a law of the United States,' every suit by or against, and every defense to such a suit by a federal corporation must arise under the laws of the United States, why require it to set forth in its petition for removal that its defense does arise under such a law? If such a corporation cannot 'have a case which does not arise literally, as well as substantially, under the law,' what is the necessity for saying more than that it is such a corporation?"

If such able judges as the Chief Justice and Mr. Justice Miller would dissent, when Section *640 Revised Statutes were in force*, what would the Court have done in the absence of such section, and what should the Court do now, since Section 640 has been repealed?

The object in passing the law of 1887 and 1888 was to diminish removals, not to increase them. On this subject let us call attention to the case of *Tennessee vs. U. & P. Bank*. In this case the question was, Could the Federal question be raised by answer, or must it appear in the statement of plaintiff's case. In passing upon the question this Court among other things, says:

"The same rule applies more comprehensively to the acts of 1887 and 1888. In Section 1, as thereby amended, the words giving original cognizance to the Circuit Courts of the United States in this class of cases are the same as in the act of 1875 (except that the jurisdictional amount is fixed at $2,000) and it is therefore essential to their jurisdiction that the plaintiff's declaration or bill should show that he asserts a right under the Constitution or laws of the United States. But the corresponding clause in Section 2 allows removals from a State Court to be made only by defendants, and suits 'of which the Circuit Courts are given original jurisdiction by the preceding section,' thus limiting

the jurisdiction of a Circuit Court of the United States on removal by the defendant, under this section, to such suits as might have been brought in that Court by the plaintiff under the first section. The change is, in accordance with the general policy of these acts, manifest upon their face, and often recognized by this Court, to contract the jurisdiction of the Circuit Courts of the United States.

"Congress in making this change, *may well have had in mind the reason* which so eminent a judge as Mr. Justice Miller invoked in support of his dissent from the original decision that a defense under the Constitution, laws or treaties of the United States was sufficient to justify a removal by the defendant under the act of 1875. 'Looking,' said he, 'to the reason which may have influenced Congress, it may well be supposed that while that body intended to allow the removal of a suit where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the State, and when the act of Congress only came in question incidentally as part (it might be a very small part) of the defendant's plea in avoidance. In support of this view, it may be added, he in such case is not without remedy in a Federal Court, for he has pleaded and relied on such defense in the State Court, and that Court has decided against him in regard to it, he can remove the case into this Court by writ of errror, and have the question he has thus raised decided here."

Tennessee vs. Bank, 152 U. S. 462.

Now, if Congress in making the change from *either party* to the *defendant* or *defendants*, and from allowing it to be shown in the *application for removal* to the *plaintiff's statement of his own case*, "May well have had in mind, the reasons which so eminent a judge as Mr. Justice Miller invoked in support of his dissent from the original decision that a defense under the Constitution, laws or treaties of the United States was sufficient to justify a removal by the defendant under the act of 1875, then when Congress repealed Section 640 Revised Statutes of the United States, and provided that receivers could be sued without leave of court, and that property in their hands should be operated under the

law of the States where situated instead of under Federal law, might not Congress well have had in mind the "reasons of so able judges as Chief Justice Waite and Justice Miller invoked in their dissent in the Pacific removal cases, which said reasons are hereinbefore quoted?

The case of *Ry. vs. Cox*, 145 U. S. 593, has been cited as sustaining the cause of plaintiff in error. It will be conceded, that this case comes nearer sustaining the position of counsel for plaintiff in error than any other case cited, and it falls short of the mark. However this may be, in a later case in a more carefully argued opinion by the same judge who wrote the opinion in the Cox case, the doctrine in the former case has been repudiated, and the doctrine laid down flat-footed and emphatic, that the simple fact that one is the receiver of a Federal Court raises no Federal question, and that just such a suit as this one, a suit against the receiver of a railway, for negligence in operating the road *did not arise under any law of the United States.* We refer to the case of *Bausman, Receiver, vs. Dixon*, 173 U. S. 113. This was a case where an effort was being made to take the case from the Supreme Court of a State to this Court upon a writ of error.

If there was no Federal question at all for the Court to pass on, and the Court could not review the case because there was no such question, then how can it be said in the same kind of a case that there is a Federal question for the purpose of removal? We quote from the opinion:

"We are unable to find adequate ground on which to maintain jurisdiction. The contention of plaintiff in error seems to be that, because of his appointment as receiver, the judgment against him amounts to a denial of a validity of an authority exercised under the United States, or of a right or immunity specially set up or claimed under a statute of the United States. It is true that the receiver was an officer of the Circuit Court, but the validity of his authority as such

was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or so far as appeared in the State Supreme Court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the Circuit Court appointing a receiver did not create a Federal question under Section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the State Court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order.

"We have just held in *Capital National Bank of Lincoln vs. The First National Bank of Cadiz*, 172 U. S. 425, that where the receiver of a National Bank was a party defendant in the State Courts, contested the issues on a general denial, and set up no claim of a right under the Federal statutes, withdrawing the case from the application of general law, this Court had no jurisdiction to revise the judgment of the highest Court of the State resting thereon; and certainly an officer of the Circuit Court stands on no higher ground than an officer of the United States."

Bausman vs. Dixon, 173 U. S. 113.

Pope vs. Ry., 173 U. S. 573.

In the case at bar the decision depended entirely upon general law and the laws of the State of Kansas. The liability to Mrs. Martin depended on the laws of the State of Kansas and upon general law, and not in any way upon the order appointing the receivers.

We therefore conclude that since the law of 1888, cases of this kind cannot be removed to the Federal Court, because in them there is no Federal question.

II.

EVEN IF A FEDERAL QUESTION WAS INVOLVED, IT WAS ABSOLUTELY NECESSARY FOR THE DEFENDANT, THE CHICAGO, ROCK ISLAND AND PACIFC RAILWAY COMPANY, TO JOIN IN THE APPLICATION, TO EFFECT A REMOVAL TO THE FEDERAL COURT.

At the time the receivers filed their petition for removal the other defendant, the Chicago, Rock Island & Pacific Railway Company had already filed its answer and submitted itself to the jurisdiction of the State Court. There being no separable controversy between the plaintiff and the defendant receivers, they could not remove the case without being joined in their petition by the other defendant, the Rock Island. The Rock Island, by answering, lost the right to remove. When the Rock Island lost the right to remove, the right of its co-defendant was gone also.

The Courts are unanimous as to this being the law in all cases where the removal is on the grounds of diverse citizenship. In the case of *Thompson vs. St. P. & K. C. Railway Company, et al.*, in a case on all fours with this case, so far as the nature of the case is concerned, Judge Sanborn uses the following language:

"The first clause of Section 2 of the removal act of 1875, is similar to the second clause of Section 2 of the act of 1887. The only difference between the two clauses is that under the act of 1875 it was provided that *either party* might remove the suit, while under the act of 1887, it is provided that the defendant or defendants, being non-residents of the State, may remove it. It was well settled under this clause of the act of 1875, that a removal could

not be effected unless all the parties on the same side of the controversy united in the petition, and I think there is no doubt that the same must be held to apply to this clause of the act of 1887."

See *Thompson vs. Railway et al.*, 60 Fed. 773 and cases cited.

Guarantee Co. vs. Bank, 28 S. E. 909.

Kane vs. City, 82 Fed. 770.

Ruohs vs. Mtg. Co., 84 Fed. 513.

Deere vs. Ry., 85 Fed. 876.

Carr vs. City, 87 Fed. 1.

It is claimed, however, that because it is claimed that the suit arises under a law of the United States a different rule prevails. It must be conceded that the Circuit judges of the United States are not in harmony on this question. Many of them have held that where a Federal question is involved that one defendant may remove. It seems to us, however, that under the law of 1887 and 1888, those holding that all must join give the best reasons for their opinions.

It was even held that under the law of 1875 that where there is no separable controversy a suit could only be removed on the petition of all the defendants even though the application specifically stated that the cause arose under the Constitution and laws of the United States.

Mayor vs. Steamboat Co., 21 Fed. 593.

In the case just cited Judge Wallace, among other things, said:

"The petition alleges among other things that the controversy arises under the Constitution and laws of the United States. If this is so, the suit can only be removed on the petition of all the defendants, unless there is a separable controversy as between the plaintiff and removing defendant. All the *substantial* parties upon one side of the

controversy must unite in order to remove the suit under the first clause of the second section of the act of March 3, 1875. (*Meyer vs. Construction Co.*, 100 U. S. 437.) Unless all desire and join in the removal it cannot be effected."

In a case before the Texas Civil Court of Appeals against two railroads by the wife for damages for the death of her husband, caused by the joint negligence of the two companies, one of which was a *Federal corporation*, that Court held:

"In an action in a State Court against two railroad companies, one of which is incorporated under the laws of the United States, it is not error to overrule a petition by such *one* only, to remove the cause to the United States Court on the ground that the cause arose under an act of Congress, as *both* should have joined in the petition."

27 S. W. 145.

Dillon's removal of Causes, Fifth Edition, Section 80, reads as follows:

"Where there is no separable controversy as between the plaintiff and removing defendant, but the ground of removal is that the controversy arises under the Constitution and laws of the United States, the suit can only be removed on the petition of all the defendants."

The case of *Shearing vs. Trumbull et al.* was a case identical with the one at bar. The suit was against Trumbull as receiver, and a Colorado corporation, brought by the wife to recover damages for the death of her husband, caused by joint negligence of the defendants, and the receiver sought to remove the case on the ground that the suit arose under a law of the United States. Judge Hallett held that the case could not be removed because the resident defendant could not join in the petition, and in an able and well reasoned opinion, said:

"Trumbull now moves to vacate the order and reinstate the case. He was appointed receiver of the Union Pacific, Denver & Gulf Railway Company in this Court, and if the action had been brought against him alone, there would be no doubt as to his right to remove it. But the suit is against the Denver Consolidated Tramway Company, a Colorado corporation, which has no right of removal, and the question is whether all parties defendant must have such right, in order that it may be maintained by any of them. It is said that the case arises under the Constitution and laws of the United States, but it is not of that character in the sense that there is any federal question to be decided. Whenever a question arises in a case as to the proper construction or effect of the Constitution or some law or treaty of the United States, a Federal Court has jurisdiction of the cause without regard to the citizenship of the parties. (*Water Company vs. Keyes*, 96 U. S. 199.) A suit by or against a federal corporation, or by or against a receiver appointed in a federal court, is not of that class. In such case the suitor has a personal standing in a federal court, in virtue of the authority under which he proceeds. A receiver appointed in a federal court is personally qualified to sue or be sued in such court, because of his appointment. He has the personal standing of a citizen of another State, when the ground of jurisdiction is the diverse citizenship of the parties. In an action of tort against several, all defendants must have the requisite qualifications in order that the suit may be removed to a federal court. (*Pirie vs. Tvedt*, 115 U. S. 41; 5 Sup. Ct. 1034, 1161.) In this instance the defendant Trumbull, as an officer of a federal court, was competent to ask for the removal, but his co-defendant was not in the same situation. As the Tramway Company was not qualified to remove the cause, the defendant Trumbull is under the same disability. In my judgment, *Landers vs. Felton*, 73 Fed. 31, on which the defendant relies, was wrongly decided, and I am not able to follow it."

Shearing vs. Trumbull, 75 Fed. 33.

The case of *Echols vs. Smith*, decided by the Court of Appeals of Kentucky, is another case which meets this question squarely, and holds that such a case is not removable.

42 S. W. 538.

The same doctrine is laid down in Black's Dillon on Removals, Section 77, part of which section reads as follows:

"When there are several defendants in a case, the question arises whether it may be removed to a Federal Court on the petition of one only, or whether all must unite in the application for removal. This must, of course, be determined by the language of the statute. And in the first place, when the ground of removability is that the case involves a Federal question (that is, that it arises under the Constitution or laws of the United States) the act of Congress of 1887 provides for its removal 'by the defendant or defendants therein.' The most plain and obvious construction of this phrase is that where there is but one defendant he may remove the cause in the manner pointed out, but where there are several defendants, the removal may be had on the application of 'the defendants,' that is, all of the defendants. And this interpretation is sanctioned by judicial authority."

Counsel for plaintiff in error place great reliance on the case of *Sonnentheil vs. Brewing Co. et al.*, 172 U. S. 401. This is not applicable to this case at all. It was not a removal case. It did not depend upon the removal statute of 1887, but was a case taken from the Court of Appeals to this Court on a writ of error, and depended upon Section 6 of the act creating the Circuit Court of Appeals, and the question was as to whether the decision of the Court of Appeals was final. The court held it was not final because the jurisdiction did not depend "*entirely* upon the opposition parties being aliens, and citizens of the United States or citizens of different States."

We now come to the case of *Mitchell vs. Smale*, 140 U. S. 406. This case was decided under the removal act of 1875, and not under the act of 1887. In this case the removing defendant set out in his petition that he had a defense under the laws of the United States, and set up the facts showing that his rights depended upon the *construction* to be placed upon a law of the United States, and that upon one construc-

tion of that law *one* decision might be given, and upon another construction an entirely different judgment.

Besides this, in this case the question of joinder of the defendants does not seem to have been considered at all, and was not referred to either by counsel or by the Court.

In conclusion let us call attention to the phraseology of the act of 1887. By this law there are just four kinds or classes of cases which may be removed to the Federal Courts. For the sake of convenience let us number them *one*, *two*, *three* and *four*. Let us set them down in their order:

No. 1. "Any suit of a civil nature at law or in equity, arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought in any State Court, may be removed by the *defendant or defendants* therein, to the Circuit Court of the United States for the proper district."

No. 2. "Any other suit of a civil nature at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought in any State Court, may be removed into the Circuit Court of the United States for the proper district by the *defendant or defendants* therein being non-residents of the State."

No. 3. "When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined between them, *then either one or more of the defendants* actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

No. 4. "Where a suit is pending or may hereafter be brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought, and a citizen of another State, *any defendant* being such citizen of another State may remove such suit into the Circuit Court of the United States for the proper district."

In Numbers *one* and *two*, the language is that "*The defendant or defendants* may remove. In Number three "*either one or more of the defendants* may do so, preceded by the word *then*, which is to say, *in that case* or when the facts are such as just described *either one or more* may remove the case. When the facts are not as described then *one or more cannot* remove. *Expressio unius est exclusio alterius.* It is not even necessary to call to our aid this rule of construction in order to give this statute the meaning contended for, as it is so plain that it construes itself. Number 1 says under circumstances so and so, the *defendant* (if there be but one) or *defendants* (if more than one) may remove; Number 2 says, under circumstances so and so the *defendant* or *defendants* may remove. Then follows Number 3 which refers back to 1 and 2 and says, but if the circumstances be so and so *then* in that case it is different, so much different that *either one or more* of the defendants may remove. In other words it says that if the suit arises under the Constitution or laws of the United States, or if it is a controversy between citizens of different States, the *defendant or defendants* may remove, but in case it is between citizens of different States and there is a *separable controversy* then a different rule prevails, and *either one or more of the defendants* may remove the case.

If Congress meant in Number 1 and 2 that one defendant could remove, why did it say *defendants*, and then in Number 3 change it to *either one or more of the defendants?*

In Number 2, cases of diverse citizenship, the words *defendant or defendants* has universally been held to mean *all* the defendants. If they mean *all* the defendants in *one* case they must mean the same thing in the other.

The attempt to remove this case comes under Number 1 or on the ground that there is a Federal question. The

Rock Island did not join in the petition. It could not join because it had answered. Under such circumstances there could be no removal, and the State court retained jurisdiction, and the judgment of the Supreme Court of Kansas must stand.

F. B. DAWES,
Attorney for ~~Plaintiff~~ Defendant in Error.

A. A. GODARD,
Of Counsel.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* MARTIN.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 135. Submitted January 31, 1900.—Decided May 21, 1900.

This was an ordinary action, under a state statute, for wrongfully causing the death of plaintiff's intestate, in which no Federal question was presented by the pleadings, or litigated at the trial, and in which the liability depended upon principles of general law, and not in any way upon the terms of the order appointing the receivers; and whatever the rights of the receivers might have been to remove the cause if they had been sued alone, the controversy was not a separable controversy within the intent and meaning of the act of March 3, 1887, as corrected by the act of August 13, 1888, and this being so, the case came solely within the first clause of the section, and it was not intended by Congress that, under such circumstances, there should be any difference between the rule applied under the first and second clauses of the act.

THIS was an action brought by Lissa Martin as administratrix of William Martin, deceased, against the Chicago, Rock Island and Pacific Railroad Company, and Clark and others, receivers of the Union Pacific Railway Company, in the District Court of Clay County, Kansas, to recover damages for the death of the decedent. Plaintiff's petition was filed January 26, 1894, and on February 14, 1894, the Chicago, Rock Island and Pacific Railroad Company filed its separate answer thereto. February 20, 1894, defendants Clark and others, as receivers, presented their petition and bond, praying for the removal of the cause to the United States Circuit Court for the District of Kansas, on the ground that the case arose under the Constitution and laws of the United States, which application was overruled by the District Court, and the receivers duly excepted. The cause was tried, the jury returned a verdict in favor of plaintiff and against all the defendants, and judgment was entered thereon. The cause was taken on error to the Supreme Court of Kansas by the defendants, and the judgment was by that court affirmed. 59 Kansas, 437.

The refusal of the state court to remove the cause to the Circuit Court of the United States on the application of the receivers was relied on as error throughout the proceedings, and the Supreme Court of Kansas held, among other things, that the application for removal was properly denied because all the defendants were charged with jointly causing the death of plaintiff's intestate, and all did not join in the petition for removal.

Mr. M. A. Low, *Mr. Winslow S. Pierce*, *Mr. W. R. Kelly*, *Mr. W. F. Evans*, *Mr. A. L. Williams* and *Mr. N. H. Loomis* for plaintiffs in error.

Mr. A. A. Godard and *Mr. F. B. Dawes* for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court.

Assuming that as to the receivers the case may be said to have arisen under the Constitution and laws of the United States, the question is whether it was necessary for the Chicago, Rock Island and Pacific Railroad Company, defendant, to join in the application of its co-defendants, the receivers of the Union Pacific Railway Company, to effect a removal to the Circuit Court.

The Rock Island Company was not a corporation of Kansas, and all the receivers of the Union Pacific Railroad Company were citizens of some other State than the State of Kansas. But the receivers applied for removal, after the Rock Island Company had answered, on the ground that the suit was, as to them, "one arising under the laws of the United States," in that they were appointed receivers by the Circuit Court of the United States for the Districts of Nebraska and Kansas, to take charge of and to operate, a corporation created by the consolidation, under acts of Congress, of a corporation of the United States, a corporation of Kansas and a corporation of Colorado.

The act of March 3, 1887, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, § 2, provides:

"That any suit of a civil nature, at law or in equity, arising

under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States, for the proper district. Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such state court. . . ."

It thus appears on the face of the statute that if a suit arises under the Constitution or laws of the United States, or if it is a suit between citizens of different States, the defendant, if there be but one, may remove, or the defendants, if there be more than one; but where the suit is between citizens of different States and there is a separable controversy, then either one or more of the defendants may remove.

Under the first clause of section 2 of the act of 1875, 18 Stat. 470, c. 137, which applied to "either party," but in its reenactment in the second clause of section 2 of the act of 1887,

above quoted, is confined to the defendant or defendants, it was well settled that a removal could not be effected unless all the parties on the same side of the controversy united in the petition; and so as to the second clause of the second section of the act of 1875, which corresponds with the third clause of the second section of the act of 1887, it was held that that clause only applied where there were two or more controversies in the same suit, one of which was wholly between citizens of different States. *Hanrick* v. *Hanrick*, 153 U. S. 192, and cases cited; *Torrence* v. *Shedd*, 144 U. S. 527, and cases cited. In the latter case Mr. Justice Gray said: "As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any one of the defendants, 'separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defence may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'" And see *Whitcomb* v. *Smithson*, 175 U. S. 635.

There was no separable controversy here. The case presented a joint cause of action against all the defendants, and, indeed, the removal was applied for on the ground that the suit arose under the Constitution and laws of the United States. It, therefore, came within the first clause of the section quoted, and if the same rule governs proceedings under that clause that obtains in respect of the second clause, the judgment of the Supreme Court of Kansas must be affirmed. And in view of the language of the statute we think the proper conclusion is that all the defendants must join in the application under either clause.

We do not regard *Sonnenthiel* v. *Moerlein Brewing Company*, 172 U. S. 401, as in point. There an action had been brought in the Circuit Court of the United States for the Eastern Dis-

trict of Texas by a citizen of Texas, against an Ohio corporation and a United States marshal, the jurisdiction depending as to one defendant on diverse citizenship, and as to the other on the case arising under the Constitution and laws of the United States, and the question was whether the judgment of the Circuit Court of Appeals was made final by the act of March 3, 1891, which we held it was not, as the jurisdiction was not dependent entirely upon the opposite parties to the suit being citizens of different States.

Mitchell v. *Smale*, 140 U. S. 406, is, however, justly pressed on our attention as of weight in the disposition of the particular question raised in this case.

The case was this: Mitchell was a citizen of Illinois, and commenced an action of ejectment in the Circuit Court of Cook County, in that State, against three defendants, Jabez G. Smale, and John J. and Frank I. Bennett. The Bennetts, who were attorneys, appeared specially for Conrad N. Jordan, and moved that he be substituted as sole defendant. The motion was made upon an affidavit of Jordan that the Bennetts had no interest, having conveyed the property to him before the suit was commenced, and that Smale was a mere tenant under him, Jordan, and had no other interest. The court denied the motion, and thereupon Jordan was admitted to defend the cause as landlord and codefendant. Afterwards, and in due time, Jordan filed a petition, under the act of 1875, for the removal of the cause into the Circuit Court of the United States, alleging as ground of removal that the plaintiff was a citizen of Illinois, and that he, Jordan, was a citizen of New York, and was the owner of the property, and that the sole controversy in the case was between him, Jordan, and the plaintiff, stating the facts previously affirmed in his affidavit as to the want of interest in the Bennetts, and the tenancy of Smale. Subsequently Jordan obtained leave to amend his petition, and amended it so as to set up that as between him and plaintiff the controversy involved the authority of the Land Department of the United States to grant certain patents, under which he claimed the right to hold the land in dispute, after and in view of the patent under which plaintiff claimed the same land. As Smale was merely a tenant,

the court held that there was no good reason why the contest respecting the title might not have been carried on between Jordan and plaintiff alone so far as Smale was concerned; but as to the Bennetts the court thought there was greater difficulty in sustaining a removal, because they were made defendants apparently in good faith, and were not acknowledged to be tenants of Jordan, and plaintiff might well insist on prosecuting his action against them, as well as against Jordan, in order that, if he should be successful, there might be no failure of a complete recovery of the land claimed by him, but inasmuch as Jordan exhibited a claim under the authority of the United States, which was contested by Mitchell on the ground of the want of that authority, while it was true that laws of the State of Illinois might be invoked by the parties, still it was no less true that the authority of the United States to make the grant relied on would be necessarily called in question. In view of that defence the jurisdiction was sustained apparently on the ground that there was a separable controversy, and the particular terms of the different clauses of the statute were really not discussed.

The case was a peculiar one, and we must decline to allow it to control the determination of that before us.

In *Gold Washing and Water Company* v. *Keyes*, 96 U. S. 199, 203, Mr. Chief Justice Waite said: "A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . . Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law

or treaty of the United States." *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571.

In *Mitchell* v. *Smale*, the claim of Jordan was treated by the court as coming within that ruling, but the case before us does not. This was an ordinary action under a state statute for wrongfully causing the death of plaintiff's intestate. No Federal question was in fact presented by the pleadings nor litigated at the trial. The liability depended on principles of general law applicable to the facts, and not in any way upon the terms of the order appointing the receivers. Whatever the rights of the receivers to remove the cause if they had been sued alone, the controversy was not a separable controversy within the intent and meaning of the act. This being so, the case came solely within the first clause of the section, and we are of opinion that it was not intended by Congress that, under such circumstances, there should be any difference between the rule applied under the first and the second clauses of section 2 of the act of 1887–8.

Judgment affirmed.